

Arbitration

March 18, 2011

273

1 so scared. I don't care what you call it, but I
2 requested Wells Fargo to hire corporate security for
3 that office for at least -- I think they were there for
4 a week where they took me back and forth to my car
5 because I was literally afraid of him at that point.
6 And the thought of having to come here today was
7 really -- was really hard.

8 Q. Take a minute. I'm going to leave this
9 topic. We're almost done. We're almost done. Take a
10 minute.

11 It might help you to take a look at
12 Exhibit 8 in the notebook. Grab a drink of water. And
13 what I'm going to ask you to do, Mary, is go into the
14 U5. Take a minute. Take your time. We're almost done.
15 Get the 5. Do you see that?

16 A. Yeah.

17 Q. And in connection with that U5, the
18 statements that are contained there where it says -- it
19 would be page 122 at the bottom, where it says that he
20 was discharged for violation of company policies, the
21 reasons stated, are those reasons that are stated there
22 accurate statements?

23 A. Yes.

24 CHAIRMAN: Where on 22 are you looking?

25 MR. KANE: 122 where it says "violation of



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Arbitration

March 18, 2011

274

1 company policies".

2 CHAIRMAN: At the top, not the bottom.

3 BY MR. KANE:

4 Q. Right. Where it says "violation of company
5 policy, representative lacks justification for charging
6 the equity securities that exceeded the schedule.

7 Representative received written customer complaint and
8 did not forward it."

9 In your view, are all those all accurate
10 statements that were reported by Wells Fargo on
11 Mr. Shaffer's U5?

12 A. Yes.

13 Q. And then I'm going to ask you another
14 question and we're going to be done. In Mr. Shaffer's
15 counterclaim, I won't ask the panel to go to it. It's
16 in the counterclaim, he states here, Ms. Mary Mortensen,
17 compliance manager who informed me of the termination
18 actually stated that these infractions -- that these
19 infractions would ordinarily not be grounds for
20 termination.

21 Did you ever say that to Mr. --

22 A. I don't recall that. I do recall clearly
23 that inclusive of all of the information provided is
24 what brought us to the grounds. So if you don't mind me
25 saying a little bit more, you know, as working in



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Arbitration

March 18, 2011

275

1 compliance, and excuse me, but I almost feel like we're
2 damned if we do and damned if we don't. So damned if we
3 do is I'm here today. Damned if we don't is if we
4 didn't terminate him and I had this e-mail that was
5 memorialized and he continued.

6 Or if he came, you know, he did other
7 things and it was brought to FINRA's attention, at that
8 point, as a supervisory principal, that comes back on my
9 head. And I'm responsible for it because I have this
10 note that's memorialized that, oh, it's okay because
11 Wells Fargo gouges your clients.

12 And so when you're making a determination
13 for termination, you have to look at everything. And a
14 big piece of that is -- you know, maybe I'm being a
15 little selfish, but this is my career, too. This is
16 something I take very seriously. And I'm not going to
17 have something held out there in moratorium that later
18 on has the ability to come back and ruin my career.

19 MR. KANE: I don't have any further
20 questions at this time. It's about noon. We can take a
21 lunch break.

22 CHAIRMAN: Right. We'll take a lunch
23 break. Just a second. And afterwards, Mr. Shaffer, you
24 will be able to ask Ms. Mortensen some questions. Do
25 you have any other witnesses?



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Arbitration

March 18, 2011

276

1 MR. KANE: No. I will be complete, other
2 than my attorney fee affidavit. I think we can do that
3 in closing arguments, would be what I think we could do.

4 CHAIRMAN: I suggest you present it during
5 the time the evidence is in.

6 MR. KANE: Yes. I'm going to do that. As
7 soon as Mr. Shaffer is done with Ms. Mortensen, I'll
8 present it at that time.

9 CHAIRMAN: And then we'll probably close
10 the hearing. And each of you is entitled, and, in fact,
11 we would like each of you to make a closing argument to
12 review the testimony and evidence as it has come in and
13 argue from it and indicate also the amount of damages
14 that you're seeking.

15 And I'm saying this to you as one who
16 doesn't regularly do this sort of thing to give you some
17 idea as to what's going to happen. And I think then
18 we'll be able to complete today.

19 MR. KANE: Yes, I believe you're correct.

20 ARBITRATOR: I would like to ask one more
21 question before she finishes. And that is: Had you had
22 any previous problems of this type with him before?

23 WITNESS: No.

24 CHAIRMAN: What previous contacts had you
25 had with Mr. Shaffer before either of these incidents



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Arbitration

March 18, 2011

277

1 unraveled or occurred?

2 WITNESS: You know, there's a few things.
3 I mean, there's some things that I'm aware of. And if
4 you're trying to figure out why I was afraid or what
5 brought that, I don't know if that's what you're leading
6 into.

7 CHAIRMAN: No. I'm sort of asking your
8 prior experience.

9 WITNESS: A lot of my prior contact was the
10 trade review systems and stuff like that. And then
11 there, you know, were -- I'd say that that was the
12 biggest piece of it.

13 ARBITRATOR: But you had not had a trade
14 review problem with Mr. Shaffer before this.

15 WITNESS: You know what, there's -- I can't
16 specify -- there's always a trade with almost I would
17 say every one of my financial advisers. I've had
18 something come up where maybe I didn't have a switch
19 letter and/or I wasn't comfortable with a trade or I
20 felt that there was some sort of a product concentration
21 or something that they need to be aware of. I'm in
22 constant communication with my FAs. It's not like I
23 never saw Mr. Shaffer, never spoke with him. Whenever
24 there was something, I'm in constant communication with
25 my financial advisers.



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March 18, 2011

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1 MR. KANE: But nothing that stood out like
2 what we had at the end.

3 CHAIRMAN: Would you say you had more or
4 less contact with Mr. Shaffer than your other financial
5 advisers?

6 WITNESS: Less. But I think that's
7 indicative of the amount of trades he did. Where, the
8 more trades that you review, the more opportunity that
9 I'm going to be reviewing things that I'm going to have
10 questions on.

11 If you don't do much trading, then that
12 lessens the interaction I'm going to have with you
13 because there's going to be less trades than I'm going
14 to review.

15 CHAIRMAN: How long did you know
16 Mr. Shaffer?

17 WITNESS: Since his hire date.

18 ARBITRATOR: I have only one last question.
19 It's a follow-up to your comment that Mr. Shaffer was
20 having a lot of problems with the bank.

21 WITNESS: Well, he was really, really angry
22 and there was a lot of stuff that was going back and
23 forth between his requests for medical disability.

24 At one point, I'm talking about my other
25 partner, Cindy Mathes, he had threatened suicide with



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Arbitration

March 18, 2011

279

1 her. I worked with a financial adviser who has
2 threatened suicide and they followed through with what
3 they said. And that's something you take seriously.

4 And so as a result of that, he was
5 requested to do what we call a fitness of duty exam,
6 where they -- we had reached out to him and he wanted
7 him to contact our employee assistance group to say if
8 there was anything any way that we would be able to help
9 him.

10 We felt he needed to go through this
11 fitness of duty to see if he was in a mental state to do
12 his job. And he declined our offer for that fitness of
13 duty. But it was that in culmination with other things.
14 When I know someone has threatened suicide and we are
15 pushing out a fitness of duty claim, since I've been
16 with Wells Fargo, in my whole career, he's never done
17 something like that. We kind of took all of those
18 things.

19 I was afraid of him. It wasn't "I'm going
20 to do something to you." It was more his state of mind.
21 You hear about stuff every day.

22 ARBITRATOR: Sure. The other question I
23 wonder about -- I'm sorry. I lost my train of
24 thought -- would have had to do with the insurance, the
25 fact that he had applied for disability. He felt he



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March 18, 2011

280

1 needed time off and needed to -- Metropolitan had
2 declined him the disability.

3 And there was also a piece which I can't
4 recall exactly, but it had do with there was no
5 psychiatric or a psychological issues that they felt the
6 disability was warranted, the time off.

7 WITNESS: I did -- I wasn't aware that he
8 had been denied. I know he told me, but I never saw the
9 report from Met Life. None of that ever flows to my
10 desk because he doesn't report to me.

11 ARBITRATOR: Would Jan Krug have been aware
12 of that?

13 WITNESS: I don't know.

14 CHAIRMAN: I'm going to save some questions
15 until after Mr. Shaffer. But just following up here,
16 were you part of the decision to recommend a fitness for
17 duty checkup?

18 WITNESS: No, I was not.

19 ARBITRATOR: I just have one question. Who
20 was?

21 WITNESS: Cindy Mathes and January Krug. I
22 think I was out on vacation at that time and I came back
23 and they were talking about it. We do a weekly admin
24 meeting where the branch managers and sales managers
25 talk once a week where we talk about issues, concerns



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March 18, 2011

281

1 and things like that. And it was brought up in that
2 meeting. And Cindy told me about the conversation that
3 she had had and why they had requested the fitness for
4 duty examination.

5 CHAIRMAN: Okay. Off the record.

6 (Thereupon, a break was taken.)

7 CHAIRMAN: Back on the record Wednesday
8 afternoon about 1:30.

9 The status now is for you, Mr. Shaffer, to
10 cross-examine Ms. Mortensen. And since you don't do
11 this every day, I'll just point out what you will be
12 doing. You will ask her questions and for her to
13 respond. This is not the time for you to give your
14 opinions or your speeches.

15 You could say, for example, isn't it -- is
16 it true or false that such and such is the policy at
17 Wells Fargo, is the case. And let her give her
18 response. It's not up to you at this point to argue
19 with her.

20 In the closing statements, you can express
21 your views based on the evidence, not based on your
22 thoughts or thinking, but based on what somebody said or
23 what some document showed.

24 MR. SHAFFER: Am I allowed to introduce
25 evidence at this point that I think has bearing on the



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March 18, 2011

282

1 whole matter?

2 CHAIRMAN: No. You've rested. Now, if you
3 have something that is really important, we can waive
4 that, because I don't want you to deny you your right to
5 have a full hearing. What did you have in mind?

6 MR. SHAFFER: Remember yesterday, I had
7 mentioned that I had an e-mail that I think served as an
8 ideal character reference for Mary, who is a witness in
9 this case against me. I was told I would need to save
10 that until I was cross-examining Mary. Would I have a
11 chance to do that?

12 CHAIRMAN: Has she seen the e-mail?

13 MR. SHAFFER: Yes, she has. Well, it was
14 in my discovery packet.

15 CHAIRMAN: I see.

16 MR. SHAFFER: And the person who wrote the
17 e-mail is on my witness list.

18 MR. KANE: I saw what's in his packet.
19 It's not a to/from Ms. Mortensen. It relates to this
20 third party that he had on his witness list. He wrote
21 an e-mail to Mr. Shaffer.

22 And the objection was he had him on his
23 list, he should have brought him in. I won't have a
24 chance to cross-examine this person. It's not in any
25 way impeachment to Ms. Mortensen. So I still object.



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March 18, 2011

283

1 CHAIRMAN: Right. And the issue in this
2 case is not the character of Mary Mortensen.

3 MR. SHAFFER: Well, it has become an issue
4 of my character.

5 CHAIRMAN: No, not really. It's what you
6 did and didn't do and what they did and didn't do. So
7 if that's what you have in mind as additional evidence,
8 my inclination is not to allow it in, and pending the
9 testimony that you obtained from Ms. Mortensen, whether
10 it could be allowed in for impeachment purposes, and
11 that's why I can't rule it out. But that's my
12 inclination.

13 MR. SHAFFER: By the way, this is not
14 hearsay or something that someone said to me. This is a
15 direct quote from Mary Mortensen.

16 CHAIRMAN: Why don't you go ahead and ask
17 your questions. At this point, I'm not going to allow
18 that in because I don't see a basis for it.

19 MR. SHAFFER: Okay.

20 CHAIRMAN: If one develops, I'll
21 reconsider.

22 MR. SHAFFER: I haven't been sworn in today
23 and I'm not sure if Ms. Mortensen was sworn in.

24 CHAIRMAN: Yes, she has been. And when you
25 were sworn in yesterday, it was ongoing.



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March 18, 2011

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1 MR. SHAFFER: I believe Ms. Mortensen has
2 perjured herself a couple of times.

3 MR. KANE: I'm going to object. There's no
4 call for something like that.

5 CHAIRMAN: That's exactly the sort of thing
6 that you cannot do; namely make statements, active
7 statements. You're to ask her questions.

8 MR. SHAFFER: Thank you.

9 EXAMINATION

10 QUESTIONS BY MR. SHAFFER:

11 Q. Mary, you mentioned that there is a process
12 and some kind of a computer program that you deal with
13 regularly call the broker audit or the Assenter blotter?

14 A. Yes.

15 Q. How often do you check that information?

16 A. On a daily basis.

17 Q. And how often do items come up on the
18 broker audit or the Assenter blotter?

19 A. On a daily basis.

20 CHAIRMAN: Well, you said "or". That's
21 compound. Is it the broker audit or the Assenter
22 blotter that you're asking her about?

23 MR. SHAFFER: I don't understand the
24 difference between the two. I thought they were kind of
25 the same. Could you clear that up, Mary.



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March 18, 2011

285

1 A. The broker audit is the trade blotter. The
2 exception blotter is for any exceptions that are
3 identified.

4 CHAIRMAN: Right. So I guess the question
5 is how often do you look. And answer as to both of
6 them.

7 WITNESS: Daily.

8 BY MR. SHAFFER:

9 Q. And especially in respect to the exception
10 blotter, those would be items of trade that needed your
11 additional consideration or input?

12 A. Correct.

13 Q. So those items come up daily. And how
14 often are brokers fired when an item comes up on the
15 exception audit for the first offense? I mean, when
16 this exception audit or the broker audit comes up, are
17 all the brokers on the broker audit fired for that day?

18 A. No.

19 Q. Well, what is the usual procedure then?

20 A. Typically, it depends on what the issue is
21 and the severity of the issue.

22 Q. But is it the case that brokers sometimes
23 would have several or even many items of this type and
24 not be terminated?

25 A. Yes.



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March 18, 2011

286

1 Q. What would make the difference between one
2 person being terminated on the first offense and one
3 person being able to have repetitive offenses?

4 MR. KANE: I'm going to object. She didn't
5 testify to that. That's not her testimony. He's
6 mischaracterizing it.

7 CHAIRMAN: She just testified that it's not
8 unusual for brokers to have several places on an
9 exception order.

10 MR. KANE: That she did say. The rest of
11 it, she didn't say.

12 CHAIRMAN: He's asking if one appearance on
13 the broker exception is justification for termination.

14 MR. KANE: Listen to the question.

15 ARBITRATOR: He asked the question well.

16 WITNESS: Can he repeat the question?

17 ARBITRATOR: Ask the question again.

18 BY MR. SHAFFER:

19 Q. Were brokers that had trades turn up on the
20 broker audit terminated on the first event?

21 A. No.

22 Q. And what were the variables that resulted
23 in a decision to terminate a broker or to let them have
24 several of these events?

25 A. A violation of firm policy versus just a



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March 18, 2011

287

1 review to determine whether or not I had pre-approved a
2 trade, and I had the necessary documents received for
3 switches, annuity trades or large trade approvals.

4 Q. So let's say in a case where something came
5 up in the broker audit that was considered a violation
6 of company policy, was that financial adviser, financial
7 consultant terminated immediately?

8 A. I don't recall ever having an exception
9 that showed a true violation of firm policy such as what
10 had occurred.

11 Q. Really? Okay. I'm surprised at that.
12 Could you tell us, Jan Krug was the manager who
13 terminated me and who I worked with for little more than
14 a year. Can you tell us why Jan Krug is not with Wells
15 Fargo anymore?

16 MR. KANE: Object.

17 CHAIRMAN: I didn't hear.

18 MR. SHAFFER: Why is Jan not with Wells
19 Fargo anymore?

20 CHAIRMAN: That's overruled -- I'm sorry --
21 sustained. That's not relevant.

22 BY MR. SHAFFER:

23 Q. Are you aware of any problems that brokers
24 had with Jan's predecessor, Jon Scambray?

25 MR. KANE: Same objection. This case isn't



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March 18, 2011

288

1 about --

2 CHAIRMAN: Sustained.

3 BY MR. SHAFFER:

4 Q. If we could go back to the trades, which
5 were reviewed in laborious detail this morning again
6 after being brought up yesterday, I've been in the
7 business 30 years, as you know. And I was a financial
8 adviser, financial consultant at Wells Fargo.

9 And by looking at this information, I am
10 truly unable to ascertain the actual correct amount of
11 the commission charged in this case. If you could turn
12 to the item of -- in Mr. Kane's exhibits, Item 10, and
13 go to that 023 area where it's -- calculators on the
14 top.

15 MR. KANE: She's there.

16 BY MR. SHAFFER:

17 Q. And we talked about Mary's calculation of
18 the correct commissions being a total of \$367. So there
19 was an overcharge of \$637, according to Mary's notes on
20 the bottom there. But not only does -- and
21 Ms. McClaskey seemed to understand this, and I'm not
22 understanding why in the darkened area at the top, it
23 says "max commission \$460" for one thing. Could Mary
24 explain that for us?

25 A. I couldn't before and I can't now.



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Arbitration

March 18, 2011

289

1 Q. So you did mention that. The other
2 confusing thing is if you go back to Item Number 26,
3 that it lists a maximum commission of \$690 on that
4 particular trade. And if the commission down below in
5 the nondarkened area is shown at \$197, there's one other
6 item that shows that it's still a different amount.
7 Here it is.

8 If we could flip to Item 20 under 10, ahead
9 of that particular item, where it shows a 197, which are
10 the numbers Mary used, here's another printout that
11 shows that the compared value, which I assume is the
12 appropriate commission, is \$368.

13 MR. KANE: She's already answered the
14 question as to comparative value. I think it's asked
15 and answered.

16 CHAIRMAN: Not necessarily by Mr. Shaffer.
17 Overruled. Go ahead.

18 WITNESS: The question again?

19 BY MR. SHAFFER:

20 Q. How do we reconcile the compared value
21 suggesting 368 was the correct amount for the trade, the
22 other items that show 460 and even as low as 169. I
23 just don't understand what the actual recommended
24 commission was on this trade.

25 A. The recommended commission is what would be



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March 18, 2011

290

1 identified on the commission calculator in the
2 non-highlighted portion, which was the Wells Fargo
3 commission schedule that had been provided to Thompson
4 1.

5 Q. Okay. So the correct amount of the
6 commissions were the 197 amounts or the 368 amounts?
7 I'm confused even at this point, even with my experience
8 in the business.

9 ARBITRATOR: That is what she's saying.

10 MR. SHAFFER: Well, I'd just like to point
11 out that there's some discrepancy there about what the
12 proper amount was.

13 BY MR. SHAFFER:

14 Q. And, Mary, you had mentioned that you do
15 not remember instances of brokers opting to increase the
16 commission on a trade.

17 A. Not on an equity transaction, no.

18 Q. See, that's surprising because --

19 MR. KANE: I'm going to object to this
20 characterization. She answered the question.

21 CHAIRMAN: You can't --

22 MR. SHAFFER: I've done it a lot of times
23 myself. The broker is allowed to adjust the commission
24 through the system. You don't have to override --

25 MR. KANE: I'd just like him to ask



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March 18, 2011

291

1 questions. He's going to have the chance to do closing
2 arguments.

3 CHAIRMAN: I agree.

4 MR. SHAFFER: That's why I've asked the
5 question, because I've done it myself.

6 BY MR. SHAFFER:

7 Q. Okay. Mary, with regard to the T12
8 question, which -- with regard to the T12, did you not
9 say that this includes client names and account numbers?

10 A. I understand the commission runs include
11 the clients' accounts numbers and names.

12 Q. Right. But a T12 is not a commission run.

13 A. I wouldn't know the difference because I
14 don't pay attention to the production reports, again.

15 CHAIRMAN: So are you saying that the 12
16 does not include the names and addresses?

17 WITNESS: I will tell you my understanding
18 is anything off the commission run, we have names and
19 account numbers. I'm not familiar with the compensation
20 reports. That's what I know, is what I've seen.

21 CHAIRMAN: Does it have addresses and
22 Social Security Numbers?

23 WITNESS: No, it does not.

24 CHAIRMAN: Just name and account numbers.

25 WITNESS: Correct.



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March 18, 2011

292

1 BY MR. SHAFFER:

2 Q. On the commission run, the T12, does it
3 have anyone's name on that one?

4 MR. KANE: There's no document that says
5 T12.

6 MR. SHAFFER: It's referred to as T12,
7 which is a trailing 12.

8 CHAIRMAN: I think that's what
9 Ms. McClaskey has said.

10 MR. SHAFFER: I think Mary has had
11 involvement with T12s.

12 CHAIRMAN: What is your question?

13 BY MR. SHAFFER:

14 Q. My question was: Does it list client names
15 and account numbers, and is that truly proprietary
16 information? The answer is she doesn't know, I guess.

17 CHAIRMAN: I think that's her answer.

18 BY MR. SHAFFER:

19 Q. Okay. See, I'm having trouble with items I
20 wanted to bring up as opposed to questions. Let me look
21 through my notes one quick second.

22 Mary, in regard to Jan Krug's comment about
23 drilling down on some clients, and you had mentioned
24 that that refers to looking for opportunities to refer
25 that client to what's called the private bank at Wells



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March 18, 2011

293

1 Fargo; correct?

2 A. Correct.

3 Q. Could you tell me what the minimum is for a
4 client to participate in a private bank at Wells Fargo?

5 A. To be in -- to work with a private banker,
6 it's a million dollars relationship which includes
7 deposits and loans. However, that doesn't mean that you
8 can't still cross-reference other opportunities within
9 that office, whether it's a wealth plan, some sort of
10 estate plan, a private mortgage.

11 ARBITRATOR: Mary, for my own
12 clarification, do you mean that if there is a client
13 that does not have a million dollars in assets with the
14 bank, that that client is still eligible to be referred
15 to the private client area if -- if the broker can
16 identify an issue that might be resolved for that client
17 in the private banking area, even though she's not a
18 member of the private banking group?

19 WITNESS: Yes.

20 ARBITRATOR: Thank you.

21 MR. SHAFFER: Okay. And I don't know,
22 maybe you could advise me, should I even ask any
23 questions about that final meeting when Mary was
24 concerned that I may go postal. I don't think that it's
25 really relevant in that that was after the time of my



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March 18, 2011

294

1 termination, for one thing.

2 CHAIRMAN: I thought -- are you talking
3 about a conference call?

4 MR. SHAFFER: No. The final meeting where
5 I returned the laptop and she came to tears and said she
6 was concerned about my going postal.

7 CHAIRMAN: Yes. Go ahead.

8 BY MR. SHAFFER:

9 Q. Mary, do you remember the gentleman that
10 accompanied you downstairs?

11 A. Yes.

12 Q. And I recall that you mentioned that first
13 we were to meet inside the office, and then I was
14 outside the office.

15 ARBITRATOR: Ask the question.

16 BY MR. SHAFFER:

17 Q. My question is: Who was with you to pick
18 up the laptop?

19 A. David Godding.

20 Q. And do you remember our conversation when I
21 returned the laptop?

22 A. No.

23 Q. Do you remember me stating in front of Dave
24 Godding, who is a current employee of Wells Fargo, I
25 believe, that as a response to you saying that I was



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Arbitration

March 18, 2011

295

1 flipping out, I said, "Well, what about you calling the
2 promissory note blood money" in front of Mr. Godding?

3 A. I don't recall.

4 Q. You don't recall that? It's certainly --
5 Mr. Godding is not on my witness list. But he can
6 certainly verify that I made that statement.

7 CHAIRMAN: Go on, please.

8 BY MR. SHAFFER:

9 Q. And then, Mary, in regard to other items
10 that came up regarding my suggestion that I may kill
11 myself, I was wondering where -- from where did you get
12 that information? Why did you make that statement?

13 A. It was discussed in a meeting with Cindy
14 Mathes who apparently said that conversation took place
15 with Ken Shaffer.

16 Q. What exactly did Ms. Mathes say?

17 A. The -- it was in relation to the fitness of
18 duty request, and that Ken had threatened suicide, that
19 he might as well kill himself, quote, unquote.

20 ARBITRATOR: He said that to --

21 WITNESS: To Cindy Mathes.

22 BY MR. SHAFFER:

23 Q. Mary, do you think that that kind of
24 information would be subject to a confidentiality
25 requirement?



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Arbitration

March 18, 2011

296

1 MR. KANE: That's a legal conclusion,
2 whether or not.

3 CHAIRMAN: She can answer as best she can
4 whether it's a legal answer or not, whatever her
5 understanding is.

6 A. I don't know.

7 BY MR. SHAFFER:

8 Q. Well, were you aware that Mr. Chung from
9 Kane and Fischer contacted me several times to have me
10 sign a release?

11 MR. KANE: I'm going to object to any
12 conversations she had with an attorney in my office.
13 That's attorney/client privilege.

14 CHAIRMAN: Attorney/client privilege covers
15 communications. And I think the question asked whether
16 she was aware that Mr. Chung had sought a release from
17 Mr. Shaffer.

18 MR. KANE: Well, that assumes a fact not in
19 evidence.

20 CHAIRMAN: And I don't know what that is
21 all about, so I'm going to sustain the objection.

22 BY MR. SHAFFER:

23 Q. Okay. Mary, I was wondering if you were
24 privy to the e-mail that is marked 000014 in my --

25 MR. KANE: What tab, or what number?



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Arbitration

March 18, 2011

297

1 MR. SHAFFER: It's -- it doesn't really
2 have a number. It's in the very back, just probably 20
3 pages in from the back.

4 CHAIRMAN: Before or after the Met Life?

5 MR. SHAFFER: It's before the Met Life, I
6 believe.

7 CHAIRMAN: And it's e-mails you're looking
8 for.

9 MR. SHAFFER: Yeah. It's an e-mail from --
10 with Jan's name on it. It says "administrative leave
11 option".

12 A. I was not aware.

13 BY MR. SHAFFER:

14 Q. Okay. Because I wondered what Mark's
15 comment "I thought it was going to be suggested" --

16 MR. KANE: I'm going to object. She said
17 she's not aware of it.

18 CHAIRMAN: Is this the August 3rd?

19 MR. KANE: August 12th. It's got a W14 at
20 the bottom.

21 CHAIRMAN: Okay. And what is your
22 question?

23 BY MR. SHAFFER:

24 Q. My question was if Mary was aware of this
25 e-mail.



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March 18, 2011

298

1 CHAIRMAN: The one from you to Jan or the
2 one from Jan to you?

3 MR. SHAFFER: No. This is from Mark
4 Webster to Jan Krug, Christine Longley.

5 CHAIRMAN: Were you, Ms. Mortensen, aware
6 of this e-mail prior to preparation for this trial?

7 WITNESS: No, I was not.

8 CHAIRMAN: Okay.

9 BY MR. SHAFFER:

10 Q. Mary, you're familiar with the Wells Fargo
11 compliance manual, I'm sure; right?

12 A. Yes.

13 Q. Could you tell me if the compliance manual
14 states that not submitting -- first of all, does a
15 written complaint qualify as an e-mail complaint, as
16 well?

17 A. Yes.

18 Q. And does the Wells Fargo compliance manual
19 specify that a financial advisor, financial consultant
20 would be terminated if they -- on the first event of not
21 forwarding a client complaint.

22 A. No.

23 Q. And, also, on the overcharging or what I
24 refer to as a trade error of the Winneger account, does
25 the Wells Fargo compliance manual specify that the



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Arbitration

March 18, 2011

299

1 financial adviser will be terminated for the first
2 instance of overcharging?

3 A. No.

4 MR. SHAFFER: Thank you. I rest my
5 questions.

6 CHAIRMAN: Okay. I have a few questions,
7 Ms. Mortensen. I'd ask you to look at Mr. Kane's Tab 8,
8 in particular, the U5. Actually, I'm going to focus on
9 the U5 and page 2 of the U5. And, specifically, the
10 violation of the company policies, who prepared the U5
11 in this case?

12 WITNESS: The U5 is prepared by our
13 licensing and registration department.

14 CHAIRMAN: Based on information they obtain
15 from where?

16 WITNESS: Based on information obtained
17 from the conference call that we had, and in correlation
18 with our lawyers.

19 CHAIRMAN: Okay. Now, Number 1, violation
20 states "representative lacked justification for charging
21 equity securities markup that exceeds the -- that
22 exceeded the firm's full service equity schedule."

23 And as has been discussed here, if there
24 was an equity schedule, why wouldn't that number that is
25 the commission be automatically plugged into the trading



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March 18, 2011

300

1 request? We've discussed here the number of the
2 suggested amount and the number that Mr. Shaffer put in,
3 and then there was a comparable number, and then there
4 was a maximum number. Doesn't that appear to give some
5 latitude to somebody to put in numbers between the max
6 and the suggested number?

7 WITNESS: The only number that I've ever
8 worked with is based off of the commission calculator.
9 Or if you enter a trade and that commission populates,
10 that number.

11 CHAIRMAN: Why wouldn't it always populate
12 the suggested number?

13 WITNESS: If you override it, it won't
14 populate it.

15 CHAIRMAN: And it's marked up. That is a
16 violation, even though it's permissible by the system?

17 WITNESS: That's hard to answer.

18 CHAIRMAN: Yeah.

19 ARBITRATOR: What is the difficulty in
20 answering that?

21 WITNESS: The difficulty is how much you
22 mark up something and are we following the prudent
23 manual of do no harm to our clients.

24 CHAIRMAN: Okay. Then I believe it is in
25 one of your tabs, I think it's 10, Mr. Kane, look at Tab



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March 18, 2011

301

1 10, and, particularly, Bates stamp 24. That's a printed
2 Wells Fargo document, is it not?

3 WITNESS: The trade correction form, sir.

4 CHAIRMAN: Yes. The trade correction form?

5 WITNESS: Yes, it is.

6 CHAIRMAN: And the purpose of that it is to
7 correct trades?

8 WITNESS: Yes, it is.

9 CHAIRMAN: And if the broker corrected the
10 commission which was pointed out to be too high,
11 wouldn't that correct the situation so there's no longer
12 a violation?

13 WITNESS: Yes.

14 CHAIRMAN: And you have this form for that
15 very purpose, do you not?

16 WITNESS: Yes. But please keep in mind it
17 wasn't just that thing. It was everything combined that
18 led to the decision. So it didn't -- just because we
19 corrected it, which we have an obligation to do for our
20 clients, but it is more about all -- everything combined
21 when you look at the whole picture.

22 CHAIRMAN: Were there other instances where
23 you had to correct trades that Mr. Shaffer had placed?

24 WITNESS: In regards to marking up?

25 CHAIRMAN: Equity trades.



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302

1 WITNESS: No.

2 CHAIRMAN: With regard to violation 2, it
3 states that representative -- I'm back on the U5.
4 Sorry.

5 MR. KANE: Tab 8.

6 CHAIRMAN: Violation 2 is, "The
7 representative received a written customer complaint and
8 did not forward to supervisor principal." But
9 Mr. Shaffer has testified here, and I'll be interested
10 if you know his testimony to be incorrect, that he
11 returned the money and corrected that complaint straight
12 away.

13 WITNESS: Correct.

14 CHAIRMAN: So on both of these violations,
15 they were corrected?

16 WITNESS: It was still a written complaint
17 that wasn't forwarded to us, that had we not been aware
18 of it, it could have escalated into a much different
19 situation.

20 CHAIRMAN: Except that it was corrected?

21 WITNESS: Correct.

22 CHAIRMAN: So it wasn't likely to escalate,
23 was it?

24 WITNESS: Because it was identified, no.

25 ARBITRATOR: My own recollection is that



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1 the complaint came in on a Friday, and on Monday, it was
2 corrected. When did you actually see the complaint so
3 that you could have had any impact on its being
4 corrected?

5 WITNESS: I was not -- we were not aware of
6 until afterwards.

7 ARBITRATOR: So he corrected it himself?

8 WITNESS: Yes.

9 CHAIRMAN: And I think you said there was a
10 gentleman in charge of combing e-mails to make sure that
11 they got taken -- well, that they were, what, noted, I
12 guess is what you were doing? And did that gentleman
13 inquire into whether or not this complaint had been
14 corrected and fixed so that the complaint was no longer
15 in effect, so to speak?

16 WITNESS: Yes, he did.

17 CHAIRMAN: And so he was aware that
18 Mr. Shaffer had returned the money which was apparently
19 the subject of the complaint.

20 WITNESS: I can't answer that. I'm sorry.

21 CHAIRMAN: I can understand why you
22 wouldn't know. And so is there any set policy -- strike
23 that. I'm not going to ask that.

24 Okay. That's all I have. Thank you very
25 much. If I have generated some questions that either



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1 Mr. Kane or Mr. Shaffer has, and I mean questions,
2 please go forward, and my colleagues as well.

3 MR. KANE: I don't have any additional
4 questions. We can go to closing arguments whenever.

5 ARBITRATOR: I just want to reiterate what
6 I think I heard and get a confirmation.

7 Several times it was asked if instances of
8 two times having a deviation from the amount of the
9 commission would have in and of itself constituted a
10 reason for dismissal.

11 And, secondly, that one instance of a
12 complaint, whether that in itself would have, or even in
13 both instances, in the two instances that are listed
14 here for termination explanation, whether they in and of
15 themselves would have been a typical cause for
16 dismissal.

17 WITNESS: I will say that we did terminate
18 one other gentleman for failure to forward a written
19 complaint.

20 ARBITRATOR: One time?

21 WITNESS: One time, yes.

22 ARBITRATOR: Of course, the circumstances
23 may have been different in the sense that the complaint
24 was not corrected within one business day as was in this
25 case. So are they really comparable?



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March 18, 2011

305

1 WITNESS: Yeah.

2 ARBITRATOR: But, typically, a complaint
3 can come in from a client who, for his own reasons, may
4 be very upset about something. He needed the money
5 immediately and he wanted that money right now and he
6 was being pressed by some outside event in his life, and
7 so he took it out on the broker.

8 WITNESS: The issue I question is were
9 proper disclosures made on that specific product and how
10 that product worked.

11 ARBITRATOR: Do you recall any -- I don't
12 recall any input in our hearings on that line at all.
13 Do you recall anything?

14 CHAIRMAN: I'm not sure what you're asking.

15 MR. KANE: I'm going to address it in my
16 closing argument.

17 CHAIRMAN: All right. Do you participate
18 or, Ms. Mortensen, have you in the past participated in
19 determining the wording that goes on a U5 termination
20 explanation?

21 WITNESS: No.

22 CHAIRMAN: That's your representative
23 person that does that?

24 WITNESS: Yes.

25 CHAIRMAN: And as I understand it, this



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March 18, 2011

306

1 language came out of or as a result of that conference
2 call.

3 WITNESS: Correct.

4 CHAIRMAN: Okay. Any -- okay.

5 MR. KANE: She's excused. She's not going
6 to leave the room. Before we get to closing arguments,
7 I did want to exhibit -- it's in the exhibit book, my
8 fee affidavit, and kind of admit that. And we will be
9 ready for closing arguments.

10 If the -- Exhibit 14, if you go to
11 Claimant's Exhibit 14 -- and they tie together. 14, 15
12 and 16 go together. Basically, I prepared this
13 affidavit before I came down previously to the hearing
14 and I'll tell the panel: Previously, we had exchanged a
15 fee affidavit of Mr. Chung and gave that to Mr. Shaffer.
16 But we didn't complete it in discovery, in the
17 prehearing exchange.

18 So he got a copy of not mine, but
19 Mr. Chung's -- and because I was here at the hearing, we
20 redid it for my affidavit. My affidavit really is quite
21 clear. It sets forth the billing rate for me and the
22 other attorneys, my rate at \$225 an hour.

23 It goes to the second page where it talks
24 about the total paralegal and attorney's fees are, and
25 that's \$29,814. And then it goes to the cost of the



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March 18, 2011

307

1 hearing, of what Wells Fargo has expended. And of the
2 \$8,862.06, \$1,700 is FINRA filing fees.

3 CHAIRMAN: Filing fees?

4 MR. KANE: Right. If you go to the next
5 page, it kind of summarizes all of that. If you go to
6 Tab 15, Tab 15 is the bill history that provides the
7 detail, the backup for the \$29,814. If I go to the last
8 page, you see there's that \$29,814, page 13, at the top
9 on Tab 15.

10 ARBITRATOR: Okay.

11 MR. KANE: So that ties to my fee
12 affidavit. Now, if you go to the first page, I want to
13 make a statement here. And just so we're clear, since
14 hope springs eternal, if you'll see on page 12 --

15 CHAIRMAN: Of?

16 MR. KANE: Of tab 15, I only have
17 January 4th, attend hearing eight hours. In order to
18 keep the record leave and not have to amend it, I'm
19 going to leave it this way. I'm not going to ask for
20 any more right now. I think it's cleaner and more
21 efficient to keep this affidavit the way it is.

22 But I want to orally advise the panel that
23 it does not include January 5th. I don't want that to
24 go against my client.

25 CHAIRMAN: We'll take judicial notice that



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308

1 you're here today.

2 MR. KANE: And not to charge them as to
3 what it relates to seek from Mr. Shaffer. More
4 importantly, on the itemization of the cost, the
5 \$8,862.06 that ties to the affidavit, that does not
6 include my travel time here. That doesn't include hotel
7 costs or airfare. None of that is included in this.

8 We don't expect Mr. Shaffer to reimburse
9 Wells Fargo for my travel costs or things of that
10 nature. And then all of that ties into Tab 16, which we
11 went through the summary of the unpaid principle of the
12 \$74,617.76 accrued interest at the rate under the note.
13 It's a mathematical calculation. And then the \$29,814,
14 then the costs of eight \$8,862 for the total of
15 \$116,661.02.

16 Just for the record, I would note that the
17 \$29,000 is approximately 38 percent of what Wells Fargo
18 is seeking, not that that necessarily is -- if you add
19 the unpaid principle and the accrued interest, that
20 figure comes to \$77,984.96. That's the \$74,000 and the
21 \$3,000. So if I could move into evidence Exhibits 14,
22 15 and 16, that will be all of the evidence that we
23 would intend to present.

24 CHAIRMAN: They will be admitted.

25 MR. SHAFFER: Excuse me. Am I allowed to



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March 18, 2011

309

1 ask him questions about this?

2 CHAIRMAN: Yes, you can.

3 MR. SHAFFER: At this point?

4 CHAIRMAN: That would be appropriate yes.

5 They have not yet been admitted. Go ahead, Mr. Shaffer.

6 MR. SHAFFER: Now, I'm not totally familiar
7 with the procedure here, as you're aware. It seems to
8 me that I'm being billed for Wells Fargo's legal fees in
9 defense of my counterclaim. And I wasn't -- I didn't
10 know that that was the case or that I would be possibly
11 responsible for legal fees in defense of my
12 counterclaim. So could you just --

13 CHAIRMAN: Mr. Kane, do you want to
14 respond?

15 MR. KANE: Yes. And I intend to address
16 that in my closing argument, if you'll just bear with
17 me. I can do it now.

18 CHAIRMAN: I think his point is that his
19 agreement was with regard to the promissory note and the
20 fees and costs of that, but not necessarily the
21 counterclaim.

22 MR. SHAFFER: Exactly.

23 MR. KANE: Bear with me. I have the --

24 CHAIRMAN: Agreement or alleged agreement.

25 MR. KANE: I'm doing that right now. Bear



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310

1 with me. As the panel is aware, the promissory note
2 specifically provides that he agreed to repay all of
3 Wells Fargo's costs and is seeking to collect on the
4 note.

5 The promissory note that has such a claim,
6 Wells Fargo is entitled to its attorney's fees for
7 defending against his counterclaim. And the case that I
8 was -- I'm going to cite to the panel in my closing
9 argument is Silego versus Castelluci, 21 California
10 Commission App. 4th, 873 at 879 and 80. And it's 26
11 California Commission Reporter 2d, 439. It's a
12 California Appellate Fourth District case in 1994.

13 The reason for that is that the courts have
14 concluded when somebody brings their promissory note
15 case and the other side challenges that with
16 counterclaims that are so intertwined with the payment
17 of the obligation on the promissory note, that those
18 issues are so intertwined that you are entitled to get
19 your attorney's fees for defending against the
20 counterclaim because you're seeking to enforce your
21 promissory note against all of these counterclaims to
22 set off against the promissory note.

23 Because of that, that's the rationale that
24 both the California courts and most courts have for
25 allowing parties to have their attorney's fees, because



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March 18, 2011

311

1 it's essential to enforce this note that I had to defend
2 against all these counterclaims. That's the case law in
3 California that supports that rationale.

4 CHAIRMAN: Thank you.

5 MR. SHAFFER: I have a question, if that's
6 okay. I notice there are a number of your associates
7 listed here besides Mr. Chung. And one during various
8 amounts of time and various amounts of fees. I'm
9 wondering, are all of these people authorized to be
10 involved with the case in California?

11 MR. KANE: Each one filed the certificate.
12 Mr. Volts is no longer with my firm.

13 CHAIRMAN: Mr. Sohn?

14 MR. KANE: Yeah. He filed a certificate.

15 CHAIRMAN: Do you understand what he's
16 saying?

17 MR. SHAFFER: Yes. Because I received this
18 with Mr. Kane's involvement in this case and
19 Mr. Chung's. What about the others?

20 MR. KANE: We have them.

21 MR. SHAFFER: What about the others?

22 MR. KANE: There's one for Mr. Volts as
23 well.

24 MR. SHAFFER: That might be true. What
25 about the others?



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312

1 CHAIRMAN: Some of these are paralegals.

2 MR. KANE: Some of these are paralegals
3 where you don't need it. And I will tell you that I
4 think the issue in California is if you're appearing at
5 the hearing as well, and not necessarily working out of
6 the Chicago office, but in any event, I can tell you the
7 three principle attorneys working on this case were
8 myself, Tom Volts and Mr. Chung, and all three of us
9 filed our California certificates.

10 CHAIRMAN: Those are the only attorneys
11 working on it?

12 MR. KANE: There may have been a Diane
13 Fischer who was just a supervisor. But I don't think
14 she --

15 ARBITRATOR: DCF?

16 MR. KANE: Yeah. She was a -- she didn't
17 sign any. All she did was review pleadings and some of
18 the work of the other attorneys. She didn't attend any
19 pre-hearing conferences or anything related to this
20 case. And she did not file a California certificate,
21 nor was she required to.

22 CHAIRMAN: Not required because she did not
23 appear here in California. And I believe Mr. Kane is
24 correct. It's the appearance in California, it's not
25 necessarily work that is done elsewhere. But you're



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March 18, 2011

313

1 certainly entitled to ask questions about this last
2 exhibit that he has introduced.

3 MR. SHAFFER: Those are all of my
4 questions.

5 CHAIRMAN: All right. In that case, the
6 exhibit will be admitted and we're marking it as, what,
7 14, 15, 16?

8 MR. KANE: I'm sorry, 14, 15 and 16. I
9 apologize.

10 (Claimant's Exhibits 14, 15 and 16 were
11 admitted into evidence.)

12 ARBITRATOR: Yeah. That's what I have.

13 CHAIRMAN: Okay. Now we will be entitled
14 to hear your closing argument, and we're asking you to
15 limit your comments to summation of what you believe has
16 been proven. It should include a summary of your final
17 request for damages. We can do it as a range as opposed
18 to a specific monetary amount. It's up to you.

19 And you may include a description of each
20 theory of the damages, why you think they are
21 appropriately or should be ordered.

22 The parties may begin their closing
23 arguments. And the way we go is that the claimant
24 typically will make first presentation and then the
25 respondent makes their response or their closing



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March 18, 2011

314

1 argument. And the claimant can rebut the closing
2 argument of the respondent.

3 And it's also possible that the claimant
4 not make an opening statement, but include in the
5 rebuttal all of their remarks. And Mr. Kane will advise
6 us what he wants to do in that respect. And let me just
7 read further in the script to see if it's relevant.
8 Hold on just a second. This statement is to be read.

9 We realize that at the time the claim was
10 initiated, the parties may not have had all the
11 information needed to accurately or completely
12 calculated claims for parties requesting damages.
13 Please provide us with a summary of your final request
14 for damages. You may present your final damage request
15 as a range as opposed to a specific amount.

16 In other words, what you say to us now may
17 be different than what was originally put down in your
18 claim or counterclaim. Okay.

19 The final question that it is suggested I
20 ask, do the parties have any other issues or objections
21 that you would like to raise that you have not
22 previously raised? And that's objections or issues.

23 MR. KANE: On behalf of Wells Fargo, we've
24 raised everything.

25 CHAIRMAN: Okay.



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March 18, 2011

315

1 MR. SHAFFER: I have a question as to could
2 I introduce information that -- a part of my exhibits
3 that I forgot to introduce before that I think may have
4 bearing on the situation, or are we past that phase?

5 CHAIRMAN: What are you talking about?
6 Because we're going to take this up as kind of a special
7 request.

8 MR. SHAFFER: Please. Ms. Mortensen
9 commented that the --

10 CHAIRMAN: What exhibit are you looking at?

11 MR. SHAFFER: I'm looking at an e-mail
12 that's part of my package.

13 CHAIRMAN: And is this the e-mail we talked
14 about before several times.

15 MR. SHAFFER: No. This is just one I
16 forgot to bring up. But I just think it might be
17 pertinent in that Ms. Mortensen commented that --

18 CHAIRMAN: Let's find the e-mail first.
19 You find it, and then --

20 MR. SHAFFER: It's Number 4 under my
21 exhibits.

22 CHAIRMAN: And you might give us a general
23 description of what it is and why you think it's
24 appropriate.

25 MR. SHAFFER: It's an e-mail that I had



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Arbitration

March 18, 2011

316

1 sent to Mark Webster regarding concerns that I had had
2 concerning sales practices at Wells Fargo Investments.
3 The reason that I think it is pertinent is that
4 Ms. Mortensen commented that the policy infractions that
5 I committed were not ordinarily reason for termination,
6 but it was the total package of our relationship. And I
7 think that our relationship may have been affected by
8 this particular e-mail.

9 MR. KANE: If that's the reason he wants to
10 admit it, I'm going to object to it. He hasn't raised
11 any of that in any of his counterclaims here. He's got
12 issues here about reverse convertibles, the unexplained
13 disappearance of a convert. None of that relates to the
14 issues here.

15 CHAIRMAN: Except that Ms. Mortensen did
16 testify that it wasn't these two specific violations in
17 and of themselves, it was the whole bunch of things.
18 And one of the things that she talked about was e-mails
19 that are in the record somewhere. That can come back to
20 bite you. This one I hear Mr. Shaffer saying may be one
21 of those e-mails.

22 MR. KANE: She's not listed on here as
23 having seen it. If he wants to introduce it, somehow
24 she was tainted by what she saw her, unless she saw it.

25 ARBITRATOR: I have a question. The e-mail



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Arbitration

March 18, 2011

317

1 is addressed to Mark Webster. Was Mark Webster one of
2 the participants in that phone conversation.

3 MS. MORTENSEN: I believe so.

4 MR. KANE: Then to save time, I'm going to
5 withdraw my objection.

6 CHAIRMAN: Okay.

7 MR. KANE: He can refer to it in his
8 closing argument rather than testify to it now, if
9 that's acceptable to the panel.

10 CHAIRMAN: Of course. It then will be
11 introduced. We are not I think -- I want to make clear,
12 taking into evidence this whole book, what we have taken
13 in are your remarks that you made, some of which were
14 read from pages here, which is fine. And we also have
15 taken in those documents which you have referred to.
16 Just like we have taken into evidence all of the tabs
17 that Mr. Kane provided, including these last four.

18 I'm not sure how we can identify those
19 documents that are in your booklet which we have talked
20 about and about which there's been no objection as
21 opposed to the many other documents in here which we
22 have not talked about, other than to state that that
23 which has been referred to and has not been objected to
24 shall be considered in evidence. So I'll let my
25 colleague figure out how to write that one up. But I



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Arbitration

March 18, 2011

318

1 think we all understand.

2 MR. KANE: Yes. I have no problem, no
3 objection.

4 CHAIRMAN: I think it's the fairest way to
5 handle this. Okay. Any other issues or objections or
6 comments?

7 MR. SHAFFER: I have one other question.

8 CHAIRMAN: Okay.

9 MR. SHAFFER: It was brought up by
10 Ms. Mortensen that I was in some type of agitated mental
11 state and that I had threatened taking my own life. And
12 I have information that's in this original presentation
13 book regarding that situation. And I was wondering if I
14 could bring that.

15 CHAIRMAN: The one thing that I did see was
16 that fitness duty recommendation or memo.

17 MR. SHAFFER: Ms. Mortensen brought up -- I
18 have in this information that's already been provided a
19 note about that fitness for duty memo, which I would
20 like to present.

21 CHAIRMAN: Okay. I think that would be
22 fair to bring in since the fitness memo was discussed.

23 MR. KANE: I just want to make sure I know
24 which one he's referring to.

25 CHAIRMAN: Which one are you looking at?



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Arbitration

March 18, 2011

319

1 MR. SHAFFER: This memo or my comments
2 regarding that.

3 CHAIRMAN: What do you want to reduce or
4 add?

5 MR. SHAFFER: This is easy. There's notes
6 on discovery materials, a cover page, and it's the one
7 right after that.

8 CHAIRMAN: You may think it's easy.

9 MR. KANE: The one after that is not the
10 document. And --

11 MR. SHAFFER: Not the e-mail.

12 MR. KANE: So I object to that if --

13 MR. SHAFFER: But the e-mail document was
14 introduced and I'd like to respond to that.

15 MR. KANE: If he wants to introduce it,
16 Mr. Chairman --

17 CHAIRMAN: Tell me about -- this testimony
18 page.

19 MR. KANE: Yeah. That I object to.

20 CHAIRMAN: This amounts to your testimony.
21 This is not a document.

22 MR. SHAFFER: No. The document was
23 introduced by Ms. Mortensen.

24 MR. KANE: No, she didn't introduce any
25 documents regarding that.



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March 18, 2011

320

1 CHAIRMAN: We have referred to the fitness,
2 and that will be included because it was referenced by
3 Ms. Mortensen. I'm talking about the memo or the letter
4 suggesting a fitness --

5 MR. SHAFFER: The whole fitness for duty,
6 I'd like to comment on that.

7 CHAIRMAN: You can comment in the closing
8 statement because the subject has been introduced.

9 MR. SHAFFER: But I never had a chance to
10 make any statement regarding that.

11 ARBITRATOR: You can do that.

12 CHAIRMAN: Go ahead.

13 MR. SHAFFER: Right now?

14 CHAIRMAN: Yeah.

15 MR. SHAFFER: You see, I wondered if this
16 would come up. Again, I had received several e-mails
17 and phone calls from Mr. Chung.

18 MR. KANE: I'm going to object to e-mails.
19 That was in discovery. That has nothing to do with
20 this. I guess what I need to do is we might as well --
21 rather than having him testify to other documents, he
22 doesn't have it in his packet. I'll pass it out to the
23 panel because it's exactly what we're talking about
24 here.

25 CHAIRMAN: Are you familiar with what he



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March 18, 2011

321

1 has here?

2 MR. SHAFFER: No, I'm not. I think it's
3 the document Mr. Chung wanted me to release.

4 ARBITRATOR: Take a look and see if you --

5 MR. KANE: These are documents that we
6 produced in discovery to Mr. Shaffer that relate to the
7 fitness for duty issues and his responses to it. It's
8 the actual documents as opposed to his narrative.

9 CHAIRMAN: We don't know what his response
10 was, do we?

11 MR. KANE: I have it here.

12 CHAIRMAN: Do you want to know what your
13 response was?

14 MR. SHAFFER: I have a written response
15 here and I never returned the form that Mr. Chung wanted
16 me to return to release this information. But this has
17 been already introduced. There's nothing new here.

18 MR. KANE: None of these documents have
19 been introduced.

20 CHAIRMAN: I don't think we've seen this.

21 MR. KANE: Let me be clear about what he's
22 referring to about Mr. Chung. Mr. Chung asked him to
23 sign an agreed protective order that the documents that
24 we marked confidential would be treated as confidential.
25 I have the proposed protective order. Mr. Shaffer



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March 18, 2011

322

1 refused to sign it.

2 In my closing argument, I'm going to ask
3 the panel to sign it and return any confidential
4 material.

5 CHAIRMAN: What confidential material are
6 you concerned about?

7 MR. KANE: In discovery, we provided him
8 all of the compensation plans of Wells Fargo. All of
9 that is confidential and proprietary material. We only
10 mark confidential things that were confidential and
11 proprietary. Things such as his own records, we didn't
12 mark these confidential.

13 I'm going to ask -- at the conclusion of my
14 closing statement, I'm going to ask the panel as part of
15 their award to so instruct him. That is the release
16 he's referring to. I really resent the way he tries to
17 categorize things.

18 CHAIRMAN: So this was a protective order
19 to keep confidential proprietary information of Wells
20 Fargo.

21 MR. KANE: Yes. And what I'm going to
22 do --

23 CHAIRMAN: Anything else?

24 MR. KANE: The order is a little more
25 extensive than what I've just said. But what I'm going



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March 18, 2011

323

1 to do in my closing argument, rather than have this
2 order entered, I'm going to ask that the panel have him
3 return any documents to Wells Fargo any documents that
4 were marked confidential.

5 CHAIRMAN: Mr. Shaffer, do you have any
6 comments on this?

7 MR. SHAFFER: I have comments on the whole
8 fitness for duty thing, and the reason.

9 CHAIRMAN: Comments on what?

10 MR. SHAFFER: The reason I didn't sign that
11 document is that I figure, you know, if -- what the
12 enemy -- if your friend is your enemy or however that
13 goes, why should I provide that information if they're
14 asking me for it?

15 I also think that is trying to get me to
16 surrender my rights you know the Americans with
17 Disabilities Act.

18 CHAIRMAN: Whether you sign it or not, I
19 guess we don't care. But Mr. Kane is asking us to order
20 you to return any proprietary information or proprietary
21 documents that are proprietary to Wells Fargo. That's
22 what he's asking.

23 ARBITRATOR: That they sent to you during
24 the exchange of documents.

25 MR. SHAFFER: I don't have a problem with



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March 18, 2011

324

1 that. I don't have any use for them. I'm not sure I
2 have them all.

3 CHAIRMAN: That's the order that we
4 anticipate him to make.

5 MR. SHAFFER: So the documents they already
6 sent me in the discovery?

7 ARBITRATOR: That are marked confidential,
8 he wants those back.

9 CHAIRMAN: So that apparently will be
10 ordered. Do you have any anything else to say on --

11 MR. SHAFFER: I'd still like to make my
12 comments on the fitness for duty thing. Here's what I
13 have. It's in my book. I truly did not notice the
14 letter -- there's a letter inviting me to take an
15 administrative leave. That's been introduced; right?

16 MR. KANE: No, the letter has not been
17 introduced. What I'd like to do to make sure the record
18 is complete is have the panel accept this.

19 CHAIRMAN: Accept what? What is this?

20 MR. KANE: When he finishes, he's talking
21 about administrative fitness for duty. He's not using
22 any documents. He's only using what he wrote after the
23 fact. I could cross-examination him because we didn't
24 offer this before, is this the letter you received? Is
25 this the response you made? That's all I would do



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March 18, 2011

325

1 because he's bringing it up.

2 MR. SHAFFER: I'm happy to share those
3 documents with the panel.

4 CHAIRMAN: What is that?

5 MR. SHAFFER: Do you want to see them?

6 CHAIRMAN: What are you holding in your
7 hand?

8 MR. SHAFFER: It is a letter from Jan Krug.
9 It's also copied in my packet. And it says this letter
10 is --

11 CHAIRMAN: Right.

12 MR. SHAFFER: -- regarding our concerns
13 about your behavior in the following areas. One thing
14 I'd like to point out, and I have my wife's signature on
15 this, I do not have any recollection of ever receiving a
16 letter. I received e-mails from Jan Krug, I never
17 received a letter in the mail. This letter is to
18 confirm the conversation.

19 Part of my exhibits is my wife also signed
20 that that she does not have any recollection of ever
21 receiving this.

22 CHAIRMAN: Right. So I noted on that
23 letter that you stated that.

24 MR. SHAFFER: Yes. It goes on in bold
25 print, "We have reason to believe that you are not able



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March 18, 2011

326

1 to work because of a possible medical problem. You are
2 constantly negative in your attitude and express
3 thoughts of killing yourself." And, again, that's what
4 prompted the fitness for duty item that Mary brought up
5 earlier, which I would like to respond to. Because
6 it's --

7 CHAIRMAN: Go ahead.

8 MR. SHAFFER: I truly do not have any
9 recollection of receiving this letter. Please see
10 second paragraph. "We have to reason to believe that
11 you are not able to work because of a possible medical
12 problem." Is this the reason that I was terminated? I
13 think the ADA has wording to protect wrongful
14 termination based on health problems.

15 I do not understand the reference to
16 thoughts of killing myself. It is possible that I said
17 the episodes of sleep apnea and the inability to catch
18 my breath made me fearful of death or made an offhand
19 remark to being better off dead. But I don't think I've
20 he ever heard of anyone dying from sleep apnea, and I
21 did not harbor suicidal thoughts. If I said something
22 in that regard, it must have been offhand and cynically
23 humorous.

24 I do not remember that in reference to one
25 short notice mandatory call event, I informed Ms. Krug



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Arbitration

March 18, 2011

327

1 that I had a conflicting doctor appointment. She sent
2 me back an e-mail that said just "Really?" Suggesting
3 she thought that I was not telling the truth. And in
4 what I thought was a humorous reply, I said, "No,
5 really. This appointment has been scheduled for some
6 time. Really, I think I will have to sell my house.
7 Really, I wish I were dead."

8 If anyone had bothered to ask me, I could
9 have told them that I had no suicidal thoughts. As far
10 as Ms. Krug's concern for my health, she never seemed to
11 be the least bit interested, nor was Ms. Brandell. Her
12 comment on my return from two months leave was, "Well,
13 you look better."

14 More telling is that another financial
15 advisor Ron Uren needed hip surgery --

16 MR. KANE: I'm going to object to that.

17 MR. SHAFFER: I thought that part might not
18 be -- so I'll stop there.

19 MR. KANE: Can you mark that 18 that I've
20 handed to you? It's W12 through 14. I'll hand it to
21 the panel. Claimant's Exhibit 18. It will be at the
22 back, the white notebook.

23 CHAIRMAN: And it is --

24 MR. KANE: I have them identified.

25 CHAIRMAN: Oh, this is the letter.



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March 18, 2011

328

1 MR. KANE: Well, there's more to it. So as
2 it relates to the first page of Exhibit 18, this is the
3 letter -- I don't know if it's a letter or e-mail. You
4 say you don't recall receiving it; is that correct?

5 MR. SHAFFER: I never got a letter in the
6 mail. I've never seen this letter before. I've never
7 seen an e-mail with this information on it.

8 MR. KANE: Go to the next page. Did you
9 receive this e-mail from Cindy Mathes to you dated
10 August 10th of 2009?

11 MR. SHAFFER: I believe so. It's addressed
12 to me. I must have got it.

13 MR. KANE: "Per our conversation and as
14 previously communicated, you would be paid for your
15 salary for the administrative leave. There is no
16 negotiation on the base pay for administrative leave.
17 If a doctor recommends medical leave, you would be
18 eligible for short-term disability. And I've copied
19 below how the benefits base is calculated."

20 And you received that from her; correct?

21 MR. SHAFFER: Correct.

22 MR. KANE: If you go to the third page at
23 the bottom, you sent an e-mail after that on August 12th
24 to Jan Krug; correct?

25 MR. SHAFFER: Correct.



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March 18, 2011

329

1 MR. KANE: And you said, "I cannot afford
2 to take you up on the administrative leave offer. The
3 income that I would receive from the recoverable draw,
4 which you erroneously refer to as salary, would result
5 in financial hardship if I was to be judged unsuitable
6 for duty."

7 In other words, you declined the offer that
8 was made to you by Wells Fargo; right?

9 MR. SHAFFER: Right. And I can explain
10 why.

11 MR. KANE: I'd just like to move that into
12 evidence so that the record is complete.

13 CHAIRMAN: Is that all right?

14 MR. SHAFFER: Sure.

15 CHAIRMAN: Okay. Are we about ready to go
16 into closing arguments?

17 MR. KANE: And as you had indicated, I will
18 reserve my entire closing for rebuttal.

19 CHAIRMAN: Which is another way of saying,
20 Mr. Shaffer, that you go first.

21 MR. SHAFFER: Okay. Well, and please guide
22 me on this, because I realize that -- you know, I
23 understand what you've told me about the format, and I'm
24 trying to stick with that. But obviously there's some
25 flexibility there.



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March 18, 2011

330

1 Okay. Regarding the promissory note,
2 the -- remember page 2 of the promissory note agreement
3 states that this promissory note will be enforced,
4 interpreted and some other term based on the -- laws of
5 the State of California.

6 And the thing is that the promissory note
7 is unenforceable based on the laws of the State of
8 California. And, please, if I could ask anything,
9 please review my excerpts from the Division of Labor
10 Standards Enforcement Policies and Interpretation Manual
11 or go to the website, because you will find that the
12 points I've made, which I don't need to review again
13 unless you'd like me to, basically make the promissory
14 note unenforceable.

15 And there is also contract law involved
16 here. And the promissory note is also unenforceable
17 under a number of aspects of contract law that I have
18 quoted. Those are my scratchy notes. Excuse me.

19 The promissory note agreement states the
20 note shall be interpreted, enforced and governed under
21 the laws of the State of California. Please review the
22 California Division of Labor Standards enforcement
23 policies and interpretation model.

24 A promissory note demand is clearly not
25 allowed under California labor law. And in fact, it



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March 18, 2011

331

1 creates a type of employment contract for the period of
2 the loan forgiveness.

3 My next point, wrongful termination,
4 nowhere in any Wells Fargo policy or compliance manual
5 is it stated that the types of infarctions that I
6 committed are grounds for termination.

7 And Ms. Mortensen has also replied verbally
8 that they would not ordinarily be causes for
9 termination. In fact, the manual allows three client
10 complaints per year, according to the actual manual,
11 which is one of my exhibits, and does not specify
12 actions for not forwarding a complaint. Moreover, even
13 an at-will employee has the right of justified
14 termination.

15 As far as withholding disability benefits,
16 my disability benefits were provided by Wells Fargo, I
17 thought, declined by Met Life while two physicians had
18 recommended that I needed to take time off for this
19 medical condition. Those exhibits are in my booklet. I
20 contacted Wells Fargo Employee Benefits regarding this
21 denial and received no response.

22 As far as withholding commissions is
23 involved, the situation is clearly addressed under the
24 California employment law defining commissions and
25 whether commissions can be withheld based on the



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March 18, 2011

332

1 employer's cost of doing business. And that's another
2 point that I have already addressed.

3 But as far as libel or slander on Form U5
4 and infractions that are not listed for reasons of
5 termination are ambiguously disclosed resulting in my
6 not being able to procure employment during a period
7 that could have been the most productive of my career.

8 And in regard to damages, my actual damages
9 are well over one million. Many of these infractions
10 suggest treble damages. My treatment was a malicious
11 response to my concern, Wells's lack of fiduciary
12 responsibility, my health issues and disability.

13 I'm sure an attorney representing me would
14 suggest the damages be much higher to include emotional
15 damages as well, and that a message needs to be sent to
16 Wells Fargo regarding employee rights and their
17 violation of California's public policy doctrine.

18 Damages and sanctions should also be
19 assessed against Kane and Fischer because they obviously
20 are aware of California employment law and labor
21 contract law, or they should be. So either they are not
22 even aware of California -- these provisions that I
23 pointed out, or they're aware of them and they're just
24 trying -- they're taking advantage of the arbitration
25 process, the panel and myself.



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March 18, 2011

333

1 Would this be the time when I can bring up
2 the e-mail that we discussed? During my closing
3 arguments, right, which I think may have colored my --
4 no, the e-mail.

5 CHAIRMAN: No, we're talking about Mary
6 Mortensen. Which one are you talking about?

7 MR. SHAFFER: Remember the e-mail that we
8 discussed that was to Mark Webster that I thought might
9 have affected the firm's feeling about my continued
10 employment?

11 CHAIRMAN: Yes.

12 MR. SHAFFER: This will be the time I
13 introduce this. On March 9th of 2009, I wrote Mark
14 Webster an e-mail which is Exhibit 4 in my package. It
15 says, "Hi, Mark. I've been issued a formal written
16 warning for unsatisfactory production from Barbara. My
17 monthly goal is \$20,666, which is 80 percent of my
18 actual goal", but that was the rule for 2009 after the
19 markets collapsed in 2008. Everyone was expected to
20 generate 80 percent or more of their goal.

21 "I had total production of \$20,100, missing
22 the mark by 500. My year-to-date is \$41,439, an average
23 of \$20,719.50 per month, and higher than the original
24 requirement. And I am now threatened with termination
25 in a time when prior to this meeting I felt like I was



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March 18, 2011

334

1 gaining momentum.

2 For March I booked my first TransAmerican
3 Heritage Builders sale, received my first in force
4 policy review and built business in fixed annuities. I
5 feel my branch relations are excellent. I have no
6 customer complaints. I was 14 out of 29 reps for the
7 month of the February and 8th percentage to goal. This
8 is shortly after I received the threat for termination.

9 Complicating the situation is the fact that
10 I have an outstanding promissory note. Barbara has
11 informed me that the unamortized amount would be due
12 back to Wells, a financially disastrous situation. I
13 cannot believe that Ms. Brandell is subjecting not only
14 myself but other FCs to this type of mental duress in a
15 time of crisis. Do you think this is fair and
16 reasonable?"

17 And then this is where I said that "This is
18 one of the discriminatory sorts of behaviors, that I
19 took eight weeks off last year, October, November for a
20 health problem that I'm still being treated for. I
21 currently take eight pills a day.

22 I was denied short-term disability from
23 Metropolitan Insurance with the explanation that my
24 medical records do not support disability payments, even
25 though I would assume that the recommendation to take



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March 18, 2011

335

1 time off was part of my records. They effectively
2 overruled my doctor. Amazing.

3 This situation affected my productivity
4 before I left and I had two months of zero production.
5 Barbara states that the condition of written warning is
6 based on last year's production as well. I was on track
7 to achieve my annual sales goal last year until
8 July 1st. I believe my treatment is partly based on
9 verifiable illness."

10 And then I get into a couple points that I
11 think Mr. Kane objected to, which is pointing out that
12 there's misrepresentation of a product. Which on the
13 next page, also labeled 4, misrepresentation of material
14 facts is in the general code of conduct prohibited
15 business practices.

16 And do you think that with these -- this
17 problem I'm having with Ms. Krug and Brandell, do you
18 think that Mark Webster would have called or e-mailed or
19 taken any action to communicate with me, especially when
20 I pointed out that there was misrepresentation going on?
21 Well, he did not. I have never had a personal
22 conversation with Mark Webster, never; not an e-mail
23 conversation to me, not a personal phone conversation.
24 I had never been invited to his office.

25 This, again, is after complaining of a



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Arbitration

March 18, 2011

336

1 misrepresentation going on in the branch. I can talk
2 more about that, but I believe Mr. Kane would like to
3 object to that.

4 "So in closing, I am hoping that I can be
5 on a more than month-to-month plan which is only
6 reasonable since it could compromise my ability to
7 suggest the best course of action to my clients. And
8 I'm available to verify, discuss any of these items at
9 your request and will continue to provide support for
10 clients."

11 Again, I think that that e-mail has been
12 mentioned to me as something that never should have been
13 written and that I was, you know, tying my own noose for
14 having said it. And I think it could have affected my
15 termination.

16 So in closing, we had Ms. Mortensen state
17 that the infraction that I was guilty of would not be
18 reason for termination, and that I think there's other
19 issues going on here.

20 I would like to briefly address her
21 statement that I scared her, and actually remember
22 Ms. Mortensen was driven to tears when describing the
23 situation of me returning the laptop. And she mentioned
24 a couple times that I was slouched down in my car.

25 This is just a little humorous sideline.



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Arbitration

March 18, 2011

337

1 My car is a Mazda RX8, a sports car. If it were sitting
2 here, the roof of the car is right here. I'm 6-foot-2.
3 I have to be slouched down to enter the vehicle.

4 I was never -- never, never did I in any
5 way threaten Ms. Mortensen or anyone else. You can see
6 by my e-mails, I never threatened any kind of violence.
7 I'm a nonviolent type of guy. Right now I'm outraged.
8 I'm being held up here, I'm in a \$100 a night motel
9 across the street. I'm being hit with legal fees for
10 things that I don't understand. I'm as outraged as I've
11 ever been. I think you can see I'm not a violent
12 person. I don't have it in me. I never threatened
13 anyone.

14 For Mary to say she was afraid I was going
15 to go postal and I was slouched down in my car is just
16 ridiculous. And Mary, congratulations on the crying
17 thing. You never cried at the point of our meeting.
18 But I think that was a great little bit of acting.

19 And I never threatened anyone. I returned
20 the laptop at that time. And, again, a gentleman by the
21 name of Dave Godding was with Mary there and would know
22 that I handed her the laptop and we said goodbye and
23 that was it. And then I had to get back down in my car
24 and slouch back down to my car. I just wanted to say
25 something about that.



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Arbitration

March 18, 2011

338

1 ARBITRATOR: I have a question. Are you
2 saying that the laptop you gave was the correct laptop,
3 it was not your personal laptop?

4 MR. SHAFFER: Not initially. The Wells
5 Fargo computer was a Compaq laptop computer and I happen
6 to have a personal Compaq laptop computer.

7 When I was called on an afternoon at the
8 branch and I was told by Ms. Krug to -- first we
9 discussed the e-mail and then she told me -- it was
10 approximately 1:15 at that time. And she said, "Be at
11 the Roseville office at 2:00. Bring your laptop and
12 your keys."

13 And that is from the -- you know, the
14 communication within Wells Fargo, everyone knows, all
15 the financial advisors know when the word is bring your
16 laptop and your keys, you're terminated. I've even
17 heard that explained before. So I knew that I was going
18 to be terminated.

19 And what I did was put the laptop in the
20 trunk and I had hoped to find someplace that could
21 remove the information regarding my clients that I
22 brought to Wells Fargo, which, again, was the most
23 substantial part of my client base that were not covered
24 by a noncompete agreement, and hopefully pull off a T12.
25 And I found that there was nothing that could be done.



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Arbitration

March 18, 2011

339

1 The computer was locked up.

2 So I returned it to Mary the next morning.

3 I had both computers in the trunk of my car and I had
4 given her the incorrect computer. That's the end of
5 that.

6 CHAIRMAN: Anything more, Mr. Shaffer?

7 MR. SHAFFER: Do I need to review those
8 items? I don't think I need to review the items again
9 in regard to the Division of Labor Standards Enforcement
10 Policies.

11 CHAIRMAN: No. You have provided them and
12 they are available to us is.

13 MR. SHAFFER: I would appreciate you
14 considering those and reading those over at your leisure
15 as a part of this decision. Because, again, I don't
16 understand how the promissory note could possibly be
17 enforced given the provision or how Mr. Kane could
18 enforce this action upon all of us.

19 CHAIRMAN: Well, Mr. Kane is not a party to
20 this matter.

21 MR. SHAFFER: And that's the whole story.
22 Again, the other part of my exhibits is records of my
23 attempts at my employment. Mr. Chung had subpoenaed
24 records of employment listed that I had worked for
25 without any kind of cooperation with me.



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Arbitration

March 18, 2011

340

1 And the two that he brought back that said
2 they had no record of me applying for, one of which was
3 one of the most embarrassing situations of my
4 professional career, and the situation with E-Trade
5 where I was told -- and I refer to that in my documents
6 as well.

7 But I was told that I was the one that they
8 wanted there in the office and they could -- I was told
9 specifically they could benefit from my experience.

10 So on the appointment there, having gone to
11 see the branch manager, that coming back is one of the
12 qualifiers to interview with the other brokers in the
13 office. The third time I was to meet with the branch
14 manager to formalize my agreement. The branch manager
15 had already told me I was the candidate they wanted to
16 hire.

17 When I arrived at that appointment, the
18 branch manager, Lou Hudson, who won't return my call or
19 give me any information, came out and said, "We're not
20 going to be able to meet today." Wow, just like that,
21 we're not going to meet. I said, "Oh, okay. Well,
22 you'll call me?" He said, "Yeah. Well, someone will
23 call you."

24 So I returned home and I called my contact
25 at E-Trade who had sent application documents to me. I



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Arbitration

March 18, 2011

341

1 said, "What is going on with Lou Hudson?" She explained
2 to me -- it is in here and documented, she explained to
3 me that because of the entries on my U5 and because of
4 E-Trade's requirement that what they call investment
5 consultants be registered in all states so you could
6 take a call that came in from anywhere and help these
7 people, they said that the entries on my U5 would
8 require them to write a explanation in some states when
9 I was being registered in those states; that the state
10 regulatory agency would question the U5 entries. And
11 for that reason, I was no longer considered a candidate.

12 And, again, I have a letter here signed by
13 my wife, if you'd like an independent opinion of how
14 this whole situation has affected me. But, I mean, can
15 you imagine the dismay when you think you have a job
16 lined up and these U5 entries foiled it for you?

17 And that's why there were instances where
18 Mr. Chung had forwarded to me an e-mail of E-Trade
19 saying we don't have a record of this man applying. I
20 tried to get some verification of that. I am truly
21 black-listed from E-Trade.

22 And I have a list of other employers that I
23 have interviewed with as well as my rejects, my e-mail
24 rejects from Monster.com.

25 So as far as damages are concerned, the



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Arbitration

March 18, 2011

342

1 problem is, you know, if I could find -- as you know, I
2 was unhappy at Wells Fargo. I was particularly unhappy
3 with their constant concentration and concern with
4 revenue amounts irrespective of the client base or what
5 might be best for the clients. So I might be happy to
6 leave if I could get a job making say \$100,000 doing
7 anything else. But, again, I'm not able to get a
8 face-to-face interview doing anything other than
9 brokerage. I think that affects my damages.

10 Obviously, I'd love to get another job and
11 go to work again. I haven't worked in over a year now.
12 What I've done is eroded my savings down to practically
13 nothing. The next alternative is to withdraw money from
14 an IRA, which is a total of \$100,000. After that, I'll
15 be out of money.

16 You see these guys out here on the corner
17 with last week's clothes on. I can understand their
18 plight much better now. It's not too far from realizing
19 that if I can't find a job, I could be homeless at some
20 point.

21 The other thing I'd like to mention is
22 Mr. Reece was nice enough on an earlier conference call
23 to suggest that I write a letter to Wells Fargo and ask
24 that they might adjust the items on my U5. And I just
25 wanted to mention that one of my exhibits is that I did



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Arbitration

March 18, 2011

343

1 write that letter and I never got any kind of response.

2 That, I'm sure everyone will be happy to
3 know, is all.

4 CHAIRMAN: Thank you, Mr. Shaffer. Do you
5 want to take a short break?

6 ARBITRATOR: 5, 10 minutes.

7 (Thereupon, a break was taken.)

8 CHAIRMAN: All right, Mr. Kane, your
9 closing comments?

10 MR. KANE: Thank you. At the outset, let
11 me take this opportunity on behalf of myself and Wells
12 Fargo to thank the panel. The panel has showed obvious
13 attention and patience during this hearing.

14 I know Mr. Shaffer appreciates it, and it's
15 probably one of the only things that Mr. Shaffer and I
16 are going to agree on in my closing remarks.

17 Really, I ask the panel now what I asked at
18 the beginning of the hearing, and that is that you
19 require Mr. Shaffer to do nothing more than honor the
20 written contractual agreement that he signed when he
21 accepted the loan from Wells Fargo for \$111,347. And in
22 this regard, the evidence is really not in dispute.

23 And I think the evidence has clearly
24 established that prior to Mr. Shaffer joining Wells
25 Fargo, he was aware that he would be eligible to receive



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March 18, 2011

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1 a loan from Wells Fargo at the end of his 18th month of
2 employment if he met that production requirement of
3 \$217,500 in his best 12 months, that he'd be eligible to
4 receive a loan.

5 And this is clearly set forth in the
6 documents. The two offer memos that he signed, he
7 signed one on June 6th and one on June 9th. They're in
8 Exhibits 2 and 3. Those offer letters clearly state
9 that any such payment would be pursuant to a five-year
10 loan.

11 It clearly states -- and this is all before
12 he ever joins the firm. It clearly states that it would
13 be forgiven over the five-year period each month. It
14 clearly states that if he left the firm for any reason
15 after he accepted this loan, whether voluntary or
16 involuntary, he would have to repay the balance.

17 So this was spelled out to him long before
18 he joined the firm when he signed those two offer
19 letters. The evidence is established, 18 months after
20 he joined Wells Fargo, Wells Fargo did exactly what it
21 promised to do.

22 Even before that, there's no dispute.
23 Wells Fargo paid him that nonrecoverable draw for the
24 four months, the \$48,000. He doesn't dispute that.
25 They gave him the 40 percent payout from June 15th of



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March 18, 2011

345

1 '06 to December 31st of '07. He doesn't take issue with
2 that.

3 And at the end of -- in January of 2008, at
4 the end of those 18 months, Wells Fargo again did what
5 it said it would do under that offer letter. And that
6 is it lent him the \$111,347 for which there's no
7 dispute. Mr. Shaffer signed a promissory note and
8 that's Exhibit 5.

9 And all you have to do is look at
10 Claimant's Exhibit 5 and you can see from the language
11 that Exhibit 5 is clear and unambiguous. It states it's
12 a loan. It states it's payable over five years. It
13 states it's going to accrue interest. It states that he
14 is going to have to repay it if he leaves Wells Fargo
15 for any reason, whether voluntary or involuntary.

16 In this regard, I think it's significant
17 that Mr. Shaffer doesn't deny that he signed the
18 promissory note. He doesn't deny that he received the
19 \$111,347. I went through the terms of the promissory
20 note, each of them. He admits that he understood the
21 terms of the promissory note, including the fact that he
22 would have to repay the loan if he left, whether
23 involuntarily or voluntarily.

24 The evidence has established that he was
25 discharged from the firm on October 1st of 2009 and he



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Arbitration

March 18, 2011

346

1 has not paid the unpaid balance or the accrued interest
2 on that loan. And both factually and legally -- and as
3 arbitrators, you do have to follow the law.

4 Factually and legally, under the term of
5 the written contract that he signed, he has to repay
6 that money to Wells Fargo. But rather than acknowledge
7 what is his clear contractual obligation, Mr. Shaffer
8 has come up with a myriad of theories to avoid honoring
9 his obligation.

10 And I understand he's not a lawyer. But he
11 has taken things out of context and has stated the law
12 to the extent it's very difficult for me even to start
13 to address, but I need to do that. So the first issue
14 he has is -- I'm using his issues, that I can address
15 each one of his issues.

16 It's in his issues, promissory note,
17 originally described as a bonus, never explained. I
18 never understood the terms. Well, it's clear from the
19 offer memo that it was explained to him that this was a
20 promissory note, a loan and not a bonus. Nowhere in
21 either of those offer letters that he signed does it
22 ever refer to this as a bonus. And it's not until even
23 18 months later after he's joined the film that he
24 receives the loan.

25 And it's clear under the promissory note



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March 18, 2011

347

1 that that's exactly how it's described, as a loan.
2 There's no reference in the promissory note that this is
3 a bonus. It never happened. It was never described as
4 a bonus and the documents confirm that.

5 Well, when he didn't like the fact that the
6 offer memo calls it a loan and the promissory note calls
7 it a loan, he said, well, look here, on the payroll it
8 says net pay; so therefore, it's not a loan because on
9 that payroll statement it's net pay.

10 Well, you know, that's simply frivolous.
11 What that was was an automatic deposit into his bank
12 account where they used the payroll system to make an
13 automatic deposit of \$111,347 into his bank account.
14 And the documents --

15 MR. SHAFFER: Objection.

16 CHAIRMAN: The only objection that would be
17 heard here is if Mr. Kane is referring to something that
18 has not been put in evidence. That's the only basis for
19 an objection to closing arguments. Go ahead. In other
20 words, introducing something new.

21 MR. SHAFFER: That is something kind of
22 new, whether it was a direct deposit or a check.

23 CHAIRMAN: That is not appropriate at this
24 time. Go ahead, Mr. Kane.

25 MR. KANE: So the theory that this was



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March 18, 2011

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1 somehow a bonus is contradicted by the offer memos, the
2 promissory note itself, and it's contradicted by his own
3 testimony where he admits that when he received this
4 \$111,347 loan in January of '08, he didn't record that
5 as income on his taxes. At that time, it wasn't
6 taxable. It only became taxable when the forgiveness
7 occurred and that was the taxable event. Because
8 forgiveness is an income.

9 So the documents, you know, support the
10 idea that his argument here is completely without merit.
11 Then he argues, and this is where I really have to take
12 some exception, then he argues in his issues that under
13 California state labor law states that balloon payment
14 demands for loans made to employees made at the time of
15 termination are not allowed even if the employee has
16 given his or her consent to such payments. And he cites
17 Section 11.25 in the Barnhill case.

18 Well, first of all, the labor code doesn't
19 say anything such thing that Mr. Shaffer has propounded
20 throughout this hearing, nor does the Barnhill case.
21 Just so that we all are on the same page, I made sure
22 that the panel has copies of the Barnhill case, and I
23 don't think Mr. Shaffer ever read the Barnhill case. I
24 don't think it says anything that he purports it to
25 conclude that it says. I have a copy for him, three for



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Arbitration

March 18, 2011

349

1 the panel. The panel can consider it.

2 But if you'll look at the second page of
3 the Barnhill case on the left-hand side, what it's
4 saying here, the principle --

5 MR. SHAFFER: Objection. This was never
6 offered before.

7 CHAIRMAN: You opened it up by referring to
8 the case.

9 MR. KANE: The principle question presented
10 here is whether an employer has the right to set off an
11 employee's debt against wages due -- due the employee
12 upon the employee's discharge, whether it -- to do a
13 setoff as a penalty.

14 But going to the right-hand side, this was
15 an individual who was a bookkeeper for the company. And
16 when the company discharged the person, Ms. Barnhill,
17 this is on the right-hand column, on that date, there
18 was a balance due on a promissory note that she had of
19 \$475 plus interest, and she was owed two weeks' wages
20 against that \$475. So when she went to pick up her
21 check, she was given a stub of net 0 balance of what was
22 owing on the note.

23 That's what they're talking about here. It
24 says here, "Labor Code 201 provides in relevant part if
25 an employer discharges the employee, the wages earned at



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March 18, 2011

350

1 the time are due and payable immediately." Well, that's
2 not what we have here. That's not even close to what we
3 have here.

4 If you go to page 3 on the right-hand side,
5 it says, "Unquestionably, when respondent was
6 discharged, this is on the right-hand column before the
7 footnotes, all the wages due her were immune from
8 attachment." That's true. But that's not what we have
9 here, either.

10 Then if you go to the page 4 on the
11 left-hand side, it's merely saying here, this is before
12 the penalty section, "Permitting appellant to reach
13 respondent's wages by setoff would let it accomplish
14 what neither it or any other contributor could do by
15 attachment and would defeat the legislative policy
16 underlined at exception.

17 We conclude that the employer is not
18 entitled to a setoff of debts only to get -- by an
19 employee against wages due that employee." That's what
20 Barnhill says. It doesn't say balloon payments on loans
21 aren't permissible.

22 It has nothing to do with the facts of this
23 case. And he should have read the case. What he did is
24 he looked at a manual and looked at excerpts and
25 headnotes and he didn't bother to read the cases.



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March 18, 2011

351

1 He's made all kinds of accusations here
2 against me, my firm and Wells Fargo regarding the
3 enforceability of this note. Going further, there's
4 another case where the Barnhill case was cited, and I
5 think that's significant as well, because this relates
6 to the issue of this issue unconscionability that he's
7 raised. This is the Cole Vario case, another California
8 case. And those are three for the panel. And the
9 page --

10 CHAIRMAN: Has this case been mentioned
11 before by you?

12 MR. KANE: It has not been mentioned. It's
13 in response to his calling these contracts
14 unconscionable and void. And this to refute that. This
15 is a legal argument as part of my closing.

16 CHAIRMAN: Okay. You may proceed.

17 MR. KANE: So, basically, if you would go
18 to the page that has 15 in the upper-right-hand corner,
19 it was referencing the Barnhill case on the right-hand
20 side where it distinguished Barnhill and said Barnhill
21 doesn't apply to the setting that we have here.

22 And it went on to say at the bottom that
23 referring to wages paid prohibits an employer only from
24 collecting or receiving wages that have already been
25 earned by performance of agreed-upon requirements. The



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March 18, 2011

352

1 commissions here were not so earned.

2 And what it's doing is saying that
3 application of Barnhill to this setting is just not
4 appropriate. But more importantly, this case goes on,
5 if you take a look on page 16 where it says no
6 unconscionability -- and Mr. Shaffer has referred to
7 these so-called sections in this promissory note is
8 unconscionable and an adhesion contract.

9 Well, if you go to page 17, it provides --
10 and this is what the panel needs to look at. 16
11 started -- I'm sorry, where it says there is no
12 unconscionability. And it goes on. And what I'm going
13 to read is from page 17.

14 Unconscionability analysis begins with an
15 inquiry into whether the contract is one of adhesion.
16 It sites an issue. An issue which Vario points out is
17 not a direct subject of any meaningful testimony. But
18 then he defines unconscionability has both a procedural
19 and substantive element.

20 The procedural element focuses on
21 impression or surprise due to equal -- unequal
22 bargaining power and substantive element overly harsh or
23 one-sided results. Both elements must be present.

24 Here, as demonstrated, and here as well,
25 set forth there was nothing surprising about the



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March 18, 2011

353

1 commission plans and nothing oppressive. Well, there
2 was nothing surprising about the loan that he was going
3 to receive. There certainly wasn't anything oppressive
4 about the loan.

5 He received \$111,000 use of that money for
6 five years, not taxable when he first got it, and spread
7 the tax consequences over five years. Thus, there is no
8 unconscionability, likewise, no substantive
9 unconscionability was described by the case.

10 Then it goes to the right-hand side. "The
11 court concluded there was no unconscionability because
12 plaintiff was aware of her obligations under the
13 contract and voluntarily agreed to assume them.

14 Then, particularly opposite here, the court
15 concluded there was no substantive unconscionability.
16 Substantive unconscionability is shown only by contract
17 terms. And that's certainly not what we have here.

18 And then it goes -- and so that's --
19 there's no adhesion contract, no unconscionability. And
20 continuing along those lines, he continues to say that
21 this -- the problems in California, they have some
22 boilerplate language which is unenforceable. And he
23 cites a code on that.

24 That's certainly not the case in
25 California. The case on that is the Federal Savings



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Arbitration

March 18, 2011

354

1 versus Versaccio. I'll hand that up to the panel and
2 give him a copy as well. It looks like I am one short.
3 I only have two copies of this case. I apologize. But
4 the case at page 8, and if you look at page 8, at the
5 top --

6 CHAIRMAN: I'll make a copy.

7 MR. KANE: I apologize I'm short one copy.

8 Contract of adhesion is listed at the
9 lower-right-hand corner. And, basically, what it says
10 is California courts hold that as a matter of law,
11 standardized promissory note forms into which the
12 interest rate and other agreed upon terms are inserted
13 such as the notes at issue here, are not unenforceable
14 contracts of adhesion. It is pretty clear that what
15 Mr. --

16 CHAIRMAN: Where was that?

17 MR. KANE: The page is 8 at the top. If
18 you go down to the bottom on the right-hand side, the
19 last paragraph, it says "contracts of adhesion". Under
20 that heading.

21 MR. SHAFFER: On page 8?

22 MR. KANE: And the reference is at the
23 lower-right-hand section. So it's pretty clear that a
24 non-attorney has come in here and spewed forth things
25 that are really not the law, and cast aspersions on



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Arbitration

March 18, 2011

355

1 myself and my law firm, things he just really doesn't
2 know about.

3 It's pretty clear, and that's why I had to
4 go through to make sure all the cases were here to
5 demonstrate that there's nothing unenforceable about
6 these promissory notes under California law, factually
7 or legally. And they must be enforced pursuant to
8 California law.

9 Now I'm going to address the next issue
10 that he has, and it's the next page. And it's wrongful
11 termination. And once again, Mr. Shaffer is not an
12 attorney, but he thinks he's one. And he's not and he's
13 misstated what the California law is regarding
14 termination.

15 It's I think important to note here that
16 Mr. Shaffer wasn't terminated because he got production
17 warnings. He wasn't terminated for low production.
18 Quite candidly, he could have been terminated for low
19 production because he was an at-will employee. He could
20 have been terminated for any reason. I'm going to give
21 you the California law on that in a minute.

22 He wasn't terminated for low production,
23 but for violating policy, which I'm going to get into in
24 a minute. His own documents demonstrate that although
25 he had production warnings from time to time, there are



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Arbitration

March 18, 2011

356

1 also times when he met the criteria and he was taken off
2 of the production warnings. Even Mr. Shaffer just a
3 little while ago admitted that because of the production
4 warnings, from time to time, there were also times when
5 he met the criteria and he was taken off of the
6 production warnings.

7 Even Mr. Shaffer a while ago said that
8 because of the economic conditions in 2008, that in late
9 2008 and 2009, all firms, and firm-wide, they required
10 that you meet 80 percent of the production goal. It
11 wasn't anything that was directed toward him. It was
12 firm-wide.

13 You saw in some of the rankings, he ranked
14 pretty well in connection with the other agents. He
15 wasn't terminated for his low production. I'll get into
16 that further.

17 The clear reason that he was terminated was
18 found in Exhibit 10. And in Exhibit 10, and I want to
19 make sure the panel is very clear on this, the
20 commission schedule that he should have charged these
21 customers is reflected in Exhibit 10 at pages 23 and 26.
22 That's the commission calculators.

23 And there's been a lot of questions about
24 this -- the gray area and the maximum. If you do the
25 math, the commission calculator generally follows when



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Arbitration

March 18, 2011

357

1 you get to the 167 and the other figure, the FINRA rule
2 and the FINRA guide, it used to be a rule. It's now a
3 guide. That's the markup policy. It's a FINRA rule,
4 and this is law. And I'll leave a copy with the panel.
5 I'll give a copy to Mr. Shaffer. Here's three for the
6 panel.

7 This is the markup policy. The old
8 rule-of-thumb used to be can't -- I think I have enough
9 of that one. The old rule of thumb used to be, and
10 still is, you can't mark up a trade more than 5 percent
11 of the principle.

12 As it indicates here, they made an
13 interpretation to make sure that was deemed to be a
14 guide, not a policy. But if you do the numbers, those
15 maximum amounts that are in that gray area that has a
16 systems issue which I think Ms. McClaskey saw, it
17 demonstrates if we use that maximum number against that
18 trade, you would be way, way outside of the 5 percent
19 policy.

20 So the calculator was a guide that the
21 brokers were supposed to follow. And it was on a
22 system, unless they overrode the system, which he did,
23 that would show what the correct commission was.

24 He overrode the system in order to charge
25 more than the schedule that was permitted to be charged



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Arbitration

March 18, 2011

358

1 under the schedule that Wells Fargo had in place in the
2 system. There is no doubt about that. And there is no
3 doubt about that, that he did it to adjust his revenue
4 upward to meet these goals. He wasn't terminated for
5 lack of meeting his goals.

6 It is not a justifiable reason for any
7 broker to charge excess commissions to meet quotas or
8 goals. That is a Cardinal sin. You are not then
9 using -- keeping the best interest of the client in
10 mind, you're keeping your own best interest in mind.
11 That's prohibited. It was clearly in violation of this
12 policy.

13 Then he exacerbates that when he writes
14 this e-mail. "I thought gouging was part of our
15 business plan." Can you imagine, poor Ms. Mortensen, as
16 a compliance officer, seen a broker, knowing he's
17 charged these excess commissions and getting an e-mail
18 like this that gouging is part of the business plan.

19 She did what she was supposed to do, she
20 ran it up the totem pole to the supervisors. Everybody
21 gave this strong consideration. This was legal,
22 compliant.

23 With all due respect, this e-mail in
24 Exhibit 9 comes up. And, again, I want to -- I think
25 there was some confusion about Exhibit 9. This



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Arbitration

March 18, 2011

359

1 violation was not corrected. Just so we're clear, on
2 September 11th -- it's true, it's a true on
3 September 11th, 2009, he received a written complaint
4 from a customer. There's just no two ways about it.
5 The customer said "I will contact my attorney if you
6 don't contact me. I'm pissed you got me into this." No
7 question.

8 He responds to the customer on Monday,
9 September 14th. But that doesn't cure the violation.
10 He never gave this to his supervisors, and he was
11 required to do that.

12 And there's a reason why he was required to
13 do that. There's nothing in this e-mail that says
14 everything was corrected as of Monday, September 14th or
15 that the customer is satisfied with his response and
16 there is still the risk that this customer is going to
17 have the attorney contact Wells Fargo. There's still
18 the risk that this client is still, quote, unquote,
19 pissed that you got me into this and might bring some
20 action.

21 And the purpose of the rule is so the
22 compliance department and legal department don't get
23 surprised with things. If they need to, they can't take
24 proactive action.

25 This violation was never corrected. His



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Arbitration

March 18, 2011

360

1 failure to report to the supervisor that written
2 complaint, and that's exactly what was required in the
3 compliance manual that's in the exhibit -- Exhibit 11,
4 that he affirmed he read in Exhibit 12.

5 So what we get to, then, so it's -- what we
6 get to, then is the -- and I'll get to the Exhibit 8 in
7 a minute. But Exhibit 8 is the U5, and that contains
8 clear and accurate language. And I'm going to get into
9 that in a minute.

10 Before he gets there, he next raises in his
11 issues wrongful termination. It's still part of
12 wrongful termination, that he's claiming that as a
13 result of people thinking he had a bad attitude or these
14 warnings, that he was constructively discharged, if you
15 will, or wrongfully terminated instead of for the
16 reasons stated here.

17 Well, again, the law in California is not
18 what Mr. Shaffer would like it to be, but it's clear.
19 In California, an employment relationship may generally
20 be terminated by either party at-will. This means that
21 unless they agree otherwise, either party may terminate
22 the employer/employee relationship without cause.

23 The leading case in California citing the
24 California labor code, Section 2922 is Stevenson versus
25 Superior Court that says that exactly. And it's pretty



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Arbitration

March 18, 2011

361

1 clear in the offer letters that were given to
2 Mr. Shaffer, he was an employee at at-will. It's pretty
3 clear in the private client services agreement,
4 Exhibit 4, that he was an employee at-will. They both
5 agreed to that. And it's pretty clear in the promissory
6 note that he was an employee at-will.

7 And the clause goes further. An at-will
8 employee like Mr. Shaffer may be discharged for no
9 reason or even for arbitrary or irrational reason.

10 But there is an exception: An at-will
11 employee may not be terminated for an unlawful reason.
12 If you ask an employee to commit a crime and he refuses
13 to do that, you cannot dismiss an employee for that. Or
14 a purpose that contravenes public policy. Those are the
15 only two exceptions to the tort of a tortuous discharge
16 in California.

17 That is Gant versus Pasebry Insurance, 824
18 Pacific 2d, 6A. To support a claim for tortuous
19 discharge, which is in essence what this is, the
20 violated policy must be supported by either a
21 Constitutional or statutory provision or be public in
22 the sense that it enures the benefit of the public
23 rather than serving an individual interest, and be
24 articulated at the time of discharge and be fundamental
25 and substantial.



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Arbitration

March 18, 2011

362

1 There's nothing like that that we have
2 here. Absolutely nothing. So none of the exceptions to
3 public policy or for statutory tortuous discharge are
4 applicable to the facts of this case. He simply was not
5 wrongfully terminated. As an at-will employee, he could
6 have been terminated for any reason. But he was clearly
7 terminated for just and appropriate reasons.

8 I'm going to get into that next because the
9 facts have established that there was a very valid
10 reason to terminate Mr. Shaffer. A firm simply cannot
11 risk harm to its clients by somebody who, one, charges
12 excess commissions over the schedule and then says it's
13 part of a gouging business plan and fail to report
14 customer complaints that might deprive the firm of
15 knowing that there's a problem, a potential problem out
16 there.

17 Those are appropriate reasons to terminate
18 an employee, even though the firm didn't need one. He
19 was terminated for just reasons.

20 Then we get to the issue of libel, his next
21 issue, libel and slander. Well, I alluded to it
22 yesterday, but I didn't get into all of it. The facts
23 of the matter is that defamation or libel involves
24 intentional publication of a statement of fact which is
25 false, unprivileged and has a natural tendency to injure



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Arbitration

March 18, 2011

363

1 or which causes special damages.

2 The case there is London versus Sears
3 Roebuck, Northern District of California, 619 F. Sub 2d,
4 854.

5 But the leading case is the Fontani case
6 that I referenced yesterday. And that case, I'll give
7 Mr. Shaffer a copy of the Fontani case. I do have an
8 extra copy of that.

9 This is Fantoni versus Wells Fargo. It's a
10 California case from 2005. And I'll just read the
11 headnote. You can read the document. But the headnote
12 on the right-hand side says, "Form submitted by employer
13 to the National Association of Securities", which that
14 used to be FINRA. I'm reading from the right-hand side
15 that says "Cases". This is just a headnote. You can
16 look at the body of your case.

17 Describing reasons for an employer's
18 termination, a broker/dealer has a communication before
19 a, quote, official proceeding supporting employer's
20 motion to strike former employee's defamation and
21 interference with prospective business advantage claims
22 as a strategic lawsuit, not against public policy.

23 Although the record was silent as to
24 whether the NAS actually investigated the employee based
25 on the statements, the form was a communication made in



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March 18, 2011

364

1 anticipation of an official proceeding, and thus, within
2 the last statute, which means it was absolutely
3 privileged.

4 So if you go to -- so what this case stands
5 for is the idea that -- and you can read it. It's the
6 statute in California which made this an official
7 preceding in anticipation of -- and that people can make
8 statements in anticipation of an official proceeding and
9 have an absolute privilege against a defamation claim.
10 It's what the Fontani case stands for.

11 We cited that in our response to the
12 counterclaim at pages 15 and 16 where California law
13 extends an absolute privilege against defamation claims
14 arising out of statements obtained in a Form
15 U5 because a Form U5 is a communication made in
16 anticipation of bringing an action or other official
17 proceeding. And that's the Fontani case that we cite
18 there.

19 And so first of all, the information
20 contained, as you heard from Ms. Mortensen on the U5, I
21 know the chair went into it in detail, is accurate
22 information. Number one is accurate. It's not false,
23 can't form the bases of a defamation claim because it's
24 accurate.

25 It also can't form the basis of a



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Arbitration

March 18, 2011

365

1 defamation claim because it's absolutely privileged.
2 There's a reason for that. Employers have to not fear
3 being candid with the regulators as to what happened and
4 then be sued for it. As Ms. Mortensen said, it's a
5 damned-if-you-do-and-damned-if-you-don't type situation.
6 If you put something that's innocuous on this and a
7 customer sues, I can tell you what happens in most cases
8 to firms that do those types of things.

9 It's accurate, not defamatory and in no
10 way -- as Ms. Mortensen testified, none of these
11 discussions about the e-mail or the SS commissions have
12 anything to do with his production. None of it.

13 It was because of the circumstances
14 surrounding these two trades and the e-mail that he sent
15 regarding gouging as part of the business plan.
16 Regarding the withholding of the disability benefits, we
17 saw -- I took you through that, Met Life went to great
18 pains to try and satisfy Mr. Shaffer. They had a
19 department consultant come in and review.

20 The fact of the matter is it has nothing do
21 with Wells Fargo. Its insurer did everything that it
22 was supposed to do, and its insurer made the decision to
23 deny him the benefits, not Wells Fargo.

24 As to this licensed banker program
25 commissions, you heard that. Nothing unusual about



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Arbitration

March 18, 2011

366

1 that. If a licensed banker referred him business, it
2 when into a joint rep code and it was split 50/50. It
3 happens all the time and it's not the basis of any claim
4 that can be made here. Nor could he quantify. If
5 anything, he said it was a very insignificant dollar
6 amount. So it really is not a factor here.

7 Then he made this claim of promissory
8 estoppel. We responded to that in page 17 of our
9 response to the counterclaim. Promissory estoppel is an
10 equitable doctrine to allow enforcement of a promise
11 that would otherwise be unenforceable.

12 In order to prevail on a cause of action
13 for promissory estoppel, Mr. Shaffer had to prove there
14 was a promise that was clear and unambiguous in a
15 promise that was made, and he relied on it. And in his
16 reliance, he was injured. This refers to the e-mail
17 where one person was on medical leave and Ms. Krug says,
18 "You can cover that. It's going to be business as
19 usual."

20 Well, that's no promise that he's going to
21 continue that forever. In fact, we know what happened
22 after that e-mail was the trade commission issue came
23 up. So there's no promissory estoppel here.

24 So as it relates to this, none of his
25 claims have -- in our view, have been factually correct.



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Arbitration

March 18, 2011

367

1 But also insignificantly, they're legally without merit.
2 They can't be valid because it would be against the law.

3 They are all invalid despite Mr. Shaffer's
4 stating what is law when it really isn't. He's not an
5 attorney. I understand that.

6 But then we get to the next claim of
7 damages. And the law in California is also clear on
8 that. First of all, there are no damages if Wells Fargo
9 committed no wrongdoing. So Wells Fargo did nothing
10 wrong here.

11 He has not been able to establish any of
12 these claims. And accordingly, we don't even get to the
13 issue of damages. In the event the panel wants to think
14 about that at all, though, damages may not be based on
15 sheer speculation or surmise and the mere possibility or
16 even probability that damage will result from wrongful
17 conduct does not render it actionable. That's the
18 Ferguson case of 30 Cal. Commission 4th, 1037.

19 And there's also the Garion versus Chapman
20 University case at 121 Cal. Commission Ap. 4353, which
21 says, "Whatever the proper measure of damages may be in
22 a given case, the recovery therefore is still subject to
23 the fundamental rule that damages which are speculative,
24 remote, imaginary, contingent or merely possible cannot
25 serve as a legal basis for recovery."



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March 18, 2011

368

1 In this case, he wanted to take the
2 ten-year average that has all kinds of market
3 fluctuations and moves in between. That's not the type
4 of thing that he can just come in and say that a
5 ten-year average can be applied going forward for the
6 next X years that I'm in. That requires an analysis
7 that was not done here.

8 What we did see is that, quite candidly,
9 Mr. Shaffer's business was in decline before he came to
10 Wells Fargo. In 2005, the last year that he was at H &
11 R Block before he came over to Wells Fargo, his earnings
12 were \$56,000. Clearly, on his own calculations, he made
13 more than that on an average, \$78,000 at Wells Fargo.
14 It just goes to show the speculative nature of this
15 thing.

16 Moreover, we know what the market
17 conditions were in 2008 versus the other areas that he
18 wants to compare. Quite candidly, the damages analysis
19 that he presented is just not appropriate. It's just
20 based on conjecture and speculation and is not probative
21 of any issue of damages.

22 It's been somewhat of a difficult case for
23 me. I've tried to be patient because I understand
24 Mr. Shaffer is not an attorney. But my personal
25 reputation, my firm's reputation has been challenged by



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Arbitration

March 18, 2011

369

1 him at every -- Ms. Mortensen's reputation has been
2 challenged, and it's been difficult for me to be
3 patient. And the panel has been very gracious in that
4 regard.

5 What he's done here is just wrong. What
6 he's done is tried to throw as much mud against the wall
7 against as many people as he could. And what I've had
8 to do with all of this is start scraping the mud away,
9 just scraping the mud away. And I have stripped the mud
10 away. And the wall is clean. The wall is clean.

11 Wells Fargo did not do anything wrong as it
12 relates to Mr. Shaffer. As unfortunate as his situation
13 might be, as unfortunate as the discharge might be,
14 that's the result of his own conduct, not the wrongful
15 conduct of me, not the wrongful conduct of my firm, not
16 the wrongful conduct of Ms. Mortensen, not the wrongful
17 conduct of Wells Fargo. It's the results of his own
18 actions that has consequences.

19 However, he doesn't want to accept the
20 consequences. I understand that. He doesn't want to
21 accept the consequences of his own actions. But
22 factually and legally, his claims are without merit.

23 And really, as a matter of law, pursuant to
24 the clear language of the promissory note, those claims
25 must be enforced according to the contractual terms.



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Arbitration

March 18, 2011

370

1 And pursuant to the law in California and
2 the facts that developed, all of his counterclaims must
3 be dismissed with prejudice, and this panel should award
4 Wells Fargo exactly what it asked for in Claimant's
5 Exhibit 16, and that is the unpaid principle and accrued
6 interest on the promissory note that would be
7 \$74,617.76. This is all in Tab 16, plus the accrued
8 interest of \$3,367.20 for \$77,984.96, plus the \$29,814
9 in attorney's fees as I explained what that was to the
10 panel, and \$8,862.06 in costs.

11 Because that's provided for in the
12 agreement and because as I cited the case to you, and I
13 can site it again, the reason we're able to get
14 attorney's fees for defending the counterclaim, and
15 that's the Soligo versus Castelluci, 21 Cal. App. 4th,
16 873, 26 Cal Reporter 2d 439. That's a Sixth District
17 case, 1994.

18 So the total we would ask for is
19 \$116,661.05.

20 These promissory notes, as Mr. Shaffer
21 himself has acknowledged are common in the industry. He
22 had one at Morgan Stanley for \$180,000. It's important
23 to the industry that brokers be required to honor the
24 written agreements that they sign when they accept these
25 kinds of benefits. It certainly sends the wrong message



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Arbitration

March 18, 2011

371

1 in the industry to not do that. So, again, we only ask
2 that you require him to do what he agreed to do.

3 I do again thank the panel for its time and
4 its patience.

5 CHAIRMAN: Thank you, Mr. Kane.

6 The panel will confer and may require
7 several days. But the decision will be forwarded to the
8 parties after it is sent to FINRA and to counsel, of
9 course.

10 In order to expedite delivery of the
11 panel's decision to the parties, the panel may either
12 execute a handwritten copy of the award or each
13 Arbitrator may execute a counterpart copy of the award.

14 As I failed to mention at the beginning of
15 the case, FINRA is asking each party and counsel to
16 complete an evaluation of this arbitration. That
17 participation, which of course is voluntary, assists
18 FINRA's operation and ongoing effort to improve the
19 arbitration process.

20 You can find the evaluation form at
21 www.finra.org/arbevaluation. And, actually, you can
22 Google FINRA and get their home page, and you can pick
23 out parts that are applicable and download an evaluation
24 form. If you do not have internet access or have
25 difficulty completing the evaluation online, you can ask



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Arbitration

March 18, 2011

372

1 your case administrator, who in this has turned out to
2 be Joanna Lamb, to provide a paper version of the
3 evaluation. And so FINRA does request that you do that.

4 Mr. Kane referred to certain documents that
5 were confidential and I request that they be returned.
6 And these documents were, as I understand it, in the
7 hands of Mr. Shaffer. Are there any such documents now
8 in the hands of the panel?

9 MR. KANE: No. I don't believe there are
10 any documents in the hands of the panel that have been
11 marked confidential. I think it's mainly the
12 compensation plans.

13 CHAIRMAN: So the panel has been asked to
14 request Mr. Shaffer to return them. As I understand it,
15 Mr. Shaffer does not have a problem returning those
16 confidential documents which Wells Fargo marked as
17 confidential and records as proprietary.

18 And do take all the stuff here that you
19 have brought in. I don't know what would happen to it
20 when we're through. So if there's anything that you
21 really want to retain, make sure that you secure control
22 over it.

23 The record will remain open until the panel
24 arrives at a decision and the panel determines that the
25 hearing is closed.



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Arbitration

March 18, 2011

373

1 No party will contact any member of the
2 arbitration panel directly. All communications, you
3 recall, have to be directed to the staff person at FINRA
4 and then sorted out from there. So we're going to pack
5 up and confer perhaps a little bit tonight, not much,
6 and we have made arrangements to confer over the next
7 day or so.

8 Thank you very much. I appreciate it. And
9 speaking on behalf of the panel, we appreciate the
10 civility and respect that all of the personnel, counsel,
11 witnesses, have provided each other and us during the
12 course of this. This is the way these things should
13 operate and it gives testimony contra to some of the
14 horror stories one hears about these proceedings. So
15 thank you very much. We appreciate your cooperation.

16 Off the record.
17
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Arbitration

March 18, 2011

374

CERTIFICATE OF REPORTER

I, Celena D. Moulton, Registered Professional Reporter and Certified Court Reporter and Notary Public within and for the State of Missouri do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me to the best of my ability and thereafter reduced to typewriting under my direction; that I am neither counsel for, related to, nor employed by any of the parties of the action in which this deposition was taken, and further, that I am not a relative or employee of any attorney or counsel employed by the parties thereto, nor financially or otherwise interested in the outcome of the action.

Celena D. Moulton
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for the State of Missouri

My Commission expires September 9, 2014.



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